Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

Pennsylvania National Mutual Casualty Insurance Company,

Petitioner,

v.

Linda Johnson Shores, Personal Representative of the Estate of Kenneth Johnson,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Does the Judgment of the South Carolina Court of Appeals violate the Due Process Clause of the United States Constitution by imposing liability on an automobile insurer for a default judgment entered against its insured when the insurer had no notice of the lawsuit and no opportunity to be heard?

PARTIES TO THE PROCEEDING

There is no parent corporation of Pennsylvania National Mutual Casualty Insurance Company.

The following are subsidiaries of Pennsylvania National:

1. Inservco Insurance Services, Inc.;

2. ESL, Inc.;

3. Penn National Security Insurance Company.

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1993

Pennsylvania National Mutual Casualty Insurance Company, Petitioner,

v.

Linda Johnson Shores, Personal Representative of the Estate of Kenneth Johnson, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

Pennsylvania National Mutual Casualty Insurance Company petitions for a writ of certiorari to review the judgment of the South Carolina Court of Appeals. The decision imposes liability upon Pennsylvania National for a default judgment entered against its insured where Pennsylvania National never had notice of the lawsuit. This violates Pennsylvania National's fundamental due process rights to notice and an opportunity to be heard.

PREVIOUS ORDERS AND OPINIONS

The decision of the South Carolina Supreme Court denying certiorari is printed in the Appendix, (App. 24-25).

The decision rendered by the South Carolina Court of Appeals is reported at 433 S.E.2d 913 (S.C. Ct. App. 1993). (App. 1-13).

The decision in the Court of Common Pleas for Florence County, State of South Carolina is unpublished. Linda Johnson Shores, Personal Representative of the Estate of Kenneth Johnson, v. Mitchell L. Weaver and Pennsylvania National Mutual Insurance Company, C/A No. 90-CP-21-1597, filed December 19, 1991. (App. 14-19).

STATEMENT OF JURISDICTION

The South Carolina Court of Appeals' decision was filed on July 19, 1993. A petition for rehearing was made on August 3, 1993, and denied on August 19, 1993. (App., 74-78, 22-23.) A petition for a writ of certiorari was made to the South Carolina Supreme Court on September 20, 1993, and denied on March 18, 1994. (App. 82-113, 24-25.)

The jurisdiction of this Court is invoked under Section 1257 of Title 28 of the United States Code.

CONSTITUTIONAL PROVISION

U.S. Const. amend. 14.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Kenneth Johnson obtained a default judgment against Mitchell Weaver for injuries arising out of an automobile accident. Johnson then brought this action to force Pennsylvania National Mutual Casualty Insurance Company to pay that judgment under an automobile liability insurance policy that had been issued to Mitchell Weaver. Pennsylvania National denied coverage because neither Weaver nor Johnson forwarded the suit papers and Pennsylvania National never had notice of the lawsuit or an opportunity to defend. Both the trial court and the South Carolina Court of Appeals have held that Pennsylvania National must pay the judgment despite the lack of notice and the lack of opportunity to defend.

A. The Policy

The Policy provides that a person seeking coverage must promptly forward to Pennsylvania National any legal papers in connection with an accident or loss and that a legal action cannot be maintained against Pennsylvania National unless there has been full compliance with all the terms of the policy:

> PART E -- DUTIES AFTER AN ACCIDENT OR LOSS
>
> GENERAL DUTIES
>
> ****
>
> A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

PART F -- GENERAL PROVISIONS

LEGAL ACTION AGAINST US

No legal action may be brought against us until there has been full compliance with all the terms of this policy.

Neither Johnson who seeks coverage as a third party beneficiary nor Weaver who is the policyholder forwarded suit papers to Pennsylvania National.

B. The Underlying Tort Action

Kenneth Johnson was injured in a motor vehicle accident on August 13, 1983. Johnson filed an action against defendant Mitchell Weaver on May 7, 1986, seeking damages for the injuries he sustained in the accident. Weaver failed to answer Johnson's complaint and a default was entered. A damages hearing was held and the trial court entered judgment for Plaintiff on January 27, 1988, in the amount of $250,000.00.

Neither Johnson nor Weaver sent a copy of the summons and complaint or otherwise notified Pennsylvania National of the suit. Both Johnson and

Weaver also failed to notify Pennsylvania National of the filing of the action, the entry of default, the default hearing, or the judgment.

Pennsylvania National had no notice of any of the legal proceedings until this action was filed almost three years after the entry of the final default judgment.

Johnson could have easily given notice of the lawsuit because he had previously written to Pennsylvania National. Prior to the filing of the lawsuit, Johnson made a direct demand on Pennsylvania National to pay its policy limits of $15,000.00 or Johnson would file suit. Pennsylvania National did not pay this demand.

Johnson then filed suit against Weaver but never notified Pennsylvania National. Johnson not only filed the lawsuit with no notice to Pennsylvania National but obtained a default judgment, scheduled a damages hearing, and obtained a judgment for damages. Weaver gave no notice to Pennsylvania National either.

Pennsylvania National, having received no notice of anything after the demand for payment and waiting until after the six year statute of limitations expired, destroyed its claim file.

Johnson, having obtained a judgment with no notice to Pennsylvania National, then served Pennsylvania National with a declaratory judgment seeking payment under Pennsylvania National's policy.

C. Proceedings Below

Kenneth Johnson subsequently died of causes unrelated to the accident and his personal representative filed an action on December 14, 1990, seeking a declaration of coverage for the default judgment under an automobile liability insurance policy issued by Pennsylvania National to Mitchell Weaver. Pennsylvania National answered and moved for summary judgment, denying coverage based on the failure to give Pennsylvania National notice of the lawsuit and an opportunity to appear and defend.

Johnson argued Pennsylvania National was obligated to pay the judgment under the South Carolina Financial Responsibility Act, S.C. Code Ann. §§ 56-9-10 et seq. (Law. Co-op. Rev. 1991), regardless of the policy provision and regardless of any due process rights to notice.

Johnson relied on Section 56-9-20(7)(b) which provides in part that:

> . . . no violation of the policy shall defeat or void the policy.

Pennsylvania National argued that the conditions of the Financial Responsibility Act, S.C. Code Ann. Section 56-9-20(7)(b), do not apply to its policy.

Pennsylvania National also argued that the statutory construction urged by the Plaintiff would violate the due process clause. (App. 41.)

The Trial Court held that this policy is subject to the provisions of the Financial Responsibility Act. The Trial Court concluded that Pennsylvania National must pay the policy benefits even though it never had notice of the lawsuit. The Trial Court rejected Pennsylvania National's due process arguments. (App. 16 n.6.) Pennsylvania National moved for reconsideration and asserted its due process rights. The Trial Court denied the Motion. (App. 20-21.)

Pennsylvania National appealed, urging its statutory construction and asserting that the Trial Court's statutory construction would violate the due process clause. (App. 71.) The South Carolina Court of Appeals affirmed the Trial Court. Pennsylvania National petitioned the South Carolina Supreme Court for a writ of certiorari asserting its due process rights. (App. 91.) The South Carolina Supreme Court denied the Petition for Writ of Certiorari. (App. 24-25.)

REASONS FOR GRANTING THE PETITION

The Plaintiff seeks to deprive Pennsylvania National of its property without giving notice and an opportunity to defend and be heard. This indirectly also deprives all of its policyholders [and for stock companies their shareholders] of property without notice and a chance to be heard.

The Plaintiff claims to be a person entitled to recover under the policy. He also claims that he can violate both the policy and constitutional due process requirements to give notice of the suit papers and still recover from Pennsylvania National.

In the past, the South Carolina courts have recognized and enforced insurance policy language which requires any person seeking to recover under the policy to cooperate and forward suit papers. These clauses are almost universal in insurance policies.

Now that the South Carolina courts have found that the Financial Resonsibility Act negates this policy defense, the right of an insurance company to notice and an opportunity to be heard must arise from the Constitution.

The potential interests at stake are enormous. Liability insurance is the resource for litigating and adjusting billions of dollars in claims between citizens every year. It has become the funding mechanism for the bulk of the tort liability system in the nation. Every state legislates and regulates insurance. It has much public utility.

If a state can legislate away the insurance company's right to notice of a lawsuit then the adversary process designed to protect rights and determine liabilities will be evaded.

In deciding what process is due the linchpin is notice. Without notice there will be no hearing, no neutral decision maker, no opportunity to present witnesses and evidence, no chance to confront witnesses or cross examine, and no other procedural safeguards.

This is an appropriate case for the Court to examine. The only process Pennsylvania National seeks is notice and an opportunity to be heard. In balancing the worth of due process to Pennsylvania National against the cost to the plaintiff, the worth is high and the cost is low.

The worth to Pennsylvania National is its right to appear and defend claims against the policy limits of all of its insurance in force in the marketplace. The cost of giving Pennsylvania National notice through a copy of the suit papers is simply the cost to send a copy in the mail.

I.

The judgment of the South Carolina Court of Appeals violates the due process guarantee of notice and an opportunity to be heard.

This Court has described the right to due process as "the very essence of a scheme of ordered justice." Brock v. North Carolina, 344 U.S. 424, 428, 73 S.Ct. 349, 97 L.Ed. 456 (1953).

The Due Process Clause guarantees that any party whose rights are to be affected by a judgment or order is entitled to notice and an opportunity to be heard Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 84, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988). This right is absolute. Hammond Packing Co. v. State of Arkansas, 212 U.S. 322, 350, 29 S.Ct. 370, 53 L.Ed. 530 (1909).

"Failure to give notice violates 'the most rudimentary demands of due process of law.'" Peralta, 485 U.S. at 84 (quoting Armstrong v. Manzo, 380 U.S. 545, 550, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). "[A] judgment entered without notice of service is constitutionally infirm." Id.

Judicial action enforcing a judgment against the person or property of one who was not a party to the proceeding in which the judgment was rendered violates the due process requirements of the Fifth and Fourteenth Amendments:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation which he is not designated as a party or to which he has not been made a party by service of process. .... [J]udicial action enforcing [a judgment rendered in such circumstances] against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require.

Hansberry v. Lee, 311 U.S. 32, 40-41, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

The type of notice required by the Constitution is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657 94 L.Ed. 865 (1950).

The facts of this case are the reverse. The actions taken were calculated to avoid letting Pennsylvania National know of the pendency of the action or present any objections.

The Plaintiff demanded payment from Pennsylvania National and threatened a lawsuit, so the Plaintiff knew exactly how to give notice directly to Pennsylvania National. But when the lawsuit was brought, the Plaintiff elected to serve only the insured and not to serve Pennsylvania National. The Plaintiff then continued through a default proceeding and obtained a judgment which Pennsylvania National knew

nothing about. When it was too late to do anything, the Plaintiff then went back to Pennsylvania National with this action seeking a declaration that Pennsylvania National must pay.

Pennsylvania National was a person interested in and affected by the judgment rendered in the underlying tort action. Pennsylvania National was entitled to notice of that action and an opportunity to be heard. Pennsylvania National was not given any notice at any stage.

Other state appellate courts have recognized the due process rights of insurers when faced with questions similar to those presented to the South Carolina Court of Appeals in this case. Briggs v. American Family Mut. Ins. Co., 833 P.2d 859 (Colo. App. 1992); Doe v. Brown, 203 Va. 508, 125 S.E.2d 159 (1962); Stacey v. Fidelity & Casualty Co. of New York, 114 Ohio St. 633, 151 N.E. 718 (1926).

In Stacey, the plaintiff brought an action against Fidelity & Casualty to collect a judgment which he had obtained against one of its insureds in an automobile tort action. The insurer denied liability under the automobile insurance policy on the grounds that the insured failed to give the company notice of the lawsuit. Stacey argued that a provision of the Ohio insurance code made the insurer's liability absolute and precluded the insurer from denying coverage based on the insured's failure to give notice.

The insurer argued that the legislature did not intend to give the injured party any greater rights than the insured had under the policy. The insurer also argued, as did Pennsylvania National, that if the

legislature did intend to give the injured party rights greater than those of the insured, it would be a violation of the due process clause of the United States Constitution.

The Ohio Supreme Court, unlike the South Carolina Court of Appeals, acknowledged the constitutional problem. The Ohio Court interpreted the statute so as not to deprive the insurer of its due process rights. The Ohio Court stated:

> If the language of section 9510-3 should be taken in its literal sense, and the interpretation of the plaintiff be adopted, the insurance company would have no ground of defense, and immediately upon the occurrence of an accident, resulting in loss and damage, would be bound to pay, and all questions of contributory negligence, proximate cause, and other elements bearing upon the right to recover, would be eliminated. It must necessarily be assumed that the Legislature had no such intent. To give the section such meaning would necessarily render it invalid.

151 N.E. at 719.

The Ohio Court and others have also recognized some of the practical implications of the plaintiff's interpretation. It would open the door to fraud and collusion. It would give an incentive to avoid notice to an insurance company and put a premium on evasive tactics.

A Plaintiff may not want the insurance company to know of the lawsuit. A defendant may have no consequences and no incentive if a failure to give notice does not affect the insurance company's duty to indemnify.

There will be a potential reward for those who do not cooperate and do not give notice. Mutuality of contract rights will be ignored. The adjudication of rights on the merits will be forfeited.

The Ohio Court concluded that the plaintiff's interpretation could not be accepted as a matter of due process:

> There are so many conceivable reasons why the same defenses should be made against the injured party as against the assured that it requires no elaborate course of reasoning to reach the conclusion that any effort to place the injured person in a favored position, contrary to the terms of the policy contract, would be in contravention of the due process clauses of the state and federal Constitutions.

Id. at 720. See also Conold v. Stern, 138 Ohio St. 352, 35 N.E.2d 133, 137 (1941) ("The conditions and limitations of the policy are enforceable, not only against the insured but against all persons who seek relief under it. Otherwise, the statute would violate the due process clause of the Constitution.")

In Briggs and Doe, the state courts also recognized the due process rights of insurers to notice and an opportunity to protect their rights.

In Doe, the Virginia Supreme Court of Appeals stated that:

> It is universally recognized that 'due process of law' requires that a person be given notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree or order may be entered affecting his right to liberty or property.

125 S.E.2d at 163. The Court recognized that in "John Doe" actions brought to recover uninsured motorist coverage, the insurance company is the party ultimately liable for any judgment obtained against the John Doe. Under those circumstances, due process is met by giving the uninsured motorist carrier notice of the lawsuit and the opportunity to the defend the action.

Similarly, in Briggs the Colorado Court of Appeals stated that:

> Due process requires notice and an opportunity to intervene.
>
> ****
>
> Only if an insurer has been given adequate notice of the proceeding and an opportunity to protect its interests will it be bound by a judgment against the uninsured motorist.

833 P.2d at 864.

Unlike the Ohio Supreme Court, the Colorado Court of Appeals, and the Virginia Supreme Court of Appeals, the South Carolina Court of Appeals ignored the insurer's due process rights. The United States Constitution guarantees due process to all persons and a citizen of South Carolina is entitled to the same due process as a citizen of Ohio. An insurer writing policies in South Carolina should not be afforded less constitutional protection than an insurer writing policies in Ohio. The Court should grant certiorari to resolve this split among the states.

The Court should grant certiorari for the additional reason that the South Carolina decision conflicts with the precedents of this Court.

In both Peralta and Hansberry, this Court granted petitions for certiorari and reversed decisions of state courts which deprived the petitioners of their "fundamental" and "rudimentary" rights to due process of law. In each case, the state courts tried to bind the petitioners to the terms of judgments rendered in proceedings of which the petitioners were not given notice or an opportunity to be heard. This Court stopped the state courts from violating the due process rights of those petitioners and this Petitioner asks that the Court do the same in this case.

In Peralta v. Heights Medical Center, a Texas state trial court entered a default judgment against the petitioner without the petitioner ever being given notice. When the petitioner subsequently initiated a proceeding to set aside the default judgment, the state court granted

summary judgment to the defendant on the ground that petitioner did not have a meritorious defense.

This Court reversed and held it is no answer to say due process would have led to the same result because he had no adequate defense on the merits. Only by wiping the slate clean will due process rights be preserved.

In Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), the Court said: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party. . . ." Notice by mail or some other reasonable means is what Pennsylvania National seeks.

II. The Question Presented is Significant and Timely.

The constitutional right presented in this case is obviously important to Pennsylvania National because the nature of its business involves defending and indemnifying tort claims. The insurance system which underlies the motor vehicles which move over the roads and highways of the nation depends upon notice and an opportunity to be heard.

The notice and forwarding provisions found in the Pennsylvania National policy are common to not only all automobile liability policies but all policies of liability insurance. If the legislature can take away the right to notice in the policy then insurers will be subject to having their property taken without notice and a chance to be heard unless the Court upholds the right under the due process clause.

Stealth and ambush should not be enabled. Indifference and acquiescence should not be favored.

The simple expedient of requiring notice allows all the other basic procedural safeguards to fall in place. A jury trial with the right to present evidence and confront witnesses depends first on notice. Whether a plaintiff is truly injured and whether that injury was proximately caused by the fault of another can be decided on the merits if suit papers are forwarded to the party from whom payment will be expected.

The South Carolina court posits a dilemma between the innocent injured party and the insurance company. This misapprehends both the position and character of the Plaintiff who may not be innocent. That

is often the question to be decided. There is no need to forfeit either the rights of the injured party to recover or the right of the insurance company to notice. The rights of both may be protected. The insurance company gets notice and the Plaintiff gets the right to prove his case.

The Plaintiff may not be innocent but may have actually caused the injury. The Plaintiff may not be injured. The Defendant may not be at fault. The Plaintiff may be an innocent victim. The goal is to answer these questions in a process that is basically fair.

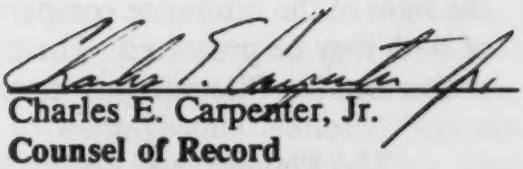
If the Court requires a plaintiff to give the insurance company notice then the rights of all interested parties will be protected.

CONCLUSION

The South Carolina Court of Appeals has deprived Pennsylvania National of its constitutional right to notice and opportunity to be heard.

The question presented is an important constitutional issue with far reaching impact beyond the confines of this case. The South Carolina Court of Appeals' decision will deprive other automobile liability insurers of their constitutional rights in future cases.

Pennsylvania National respectfully requests that this Court issue a writ of certiorari to review the decision of the South Carolina Court of Appeals.



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June 16, 1994.

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APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Linda Johnson Shores,
Personal Representative of
the Estate of Kenneth
Johnson, Respondent,

v.

Mitchell L. Weaver and
Pennsylvania National Mutual
Casualty Insurance
Company, Defendants,

of whom

Pennsylvania National
Mutual Casualty
Insurance Company is, Appellant.

Appeal from Florence County
A. Victor Rawl, Circuit Court Judge

Opinion No. 2055
Heard May 17, 1993 - Filed July 19, 1993

AFFIRMED

Charles E. Carpenter, Jr., Deborah L. Harrison, and William H. Hensel, of Richardson, Plowden, Grier & Howser, of Columbia, for appellant.

Jon Rene Josey, of Rogers and McBratney, of Florence, for respondent.

LITTLEJOHN, A.J.: Pennsylvania National Mutual Casualty Insurance Company appeals from a declaratory judgment holding it must provide coverage for an insured who suffered a judgment to be taken against him by default without providing notice to Pennsylvania National of the pending lawsuit as required by the policy. We affirm.

Pennsylvania National issued an automobile liability insurance policy to Mitchell Weaver. Among other things the policy required Weaver to promptly forward to Pennsylvania Mutual any legal papers in connection with an accident or loss, and provided that legal action could not be maintained against Pennsylvania Mutual unless Weaver fully complied with this condition. The policy provided minimal limits liability coverage.

On August 13, 1983, Kenneth Johnson was injured in an accident while riding as a passenger in Weaver's vehicle. Johnson suffered a serious brain injury which left him totally and permanently disabled. Pennsylvania National was notified of the accident on August 17, 1983 and assigned adjustment of the claim to Crawford and Company of Florence, South Carolina. In October 1983, Johnson's attorney, Marvin Jackson, notified Crawford and Company that he represented Johnson. Jackson wrote Crawford and Company again in December 1983 and February 1984, offering to settle the case for the policy limits. Finally, on February 14, 1984, Jackson wrote to Crawford and Company stating

that he had heard nothing on his prior offer to settle and adding:

> This offer to settle for $15,000 will remain open from ten (10) days of the date of this letter and if settlement is not consummated within this time, I will file suit on behalf of my Client and the settlement offer [contained] in this letter will be withdrawn.

The record reflects that Crawford and Company refused this demand.

Linda Johnson Shores, representing Johnson's estate, served an action on Weaver on May 7, 1986. Weaver did not forward the pleadings to Pennsylvania National or otherwise give any notice of the suit. Weaver failed to respond and on January 9, 1987, the court entered a default against him. After a hearing at which Weaver was present, the court entered a judgment for damages for Johnson against Weaver for $250,000 on January 27, 1988.

Pennsylvania National was not given notice of the entry of default, the damages hearing, or the entry of the order for judgment. Because six years had elapsed since the accident, Pennsylvania National destroyed its files in the matter.

Shores filed this action on behalf of Johnson seeking a declaration of coverage under Weaver's policy for the default judgment. Pennsylvania National answered and, in a motion for summary judgment, raised its policy defense that Weaver failed to forward the pleadings to Pennsylvania National. Johnson also moved

for summary judgment. The circuit court heard the cross-motions for summary judgment and ruled that Pennsylvania National could not escape its liability to Johnson for Weaver's failure to forward the pleadings in compliance with the policy's provision. Pennsylvania National appeals.

Pennsylvania National argues that under the statutory scheme as it exists today, only "certified" or "SR-22" type policies may not be defeated or voided by the insured's breach of the policy conditions, and since Weaver's policy was not a "certified" policy, it was not subject to the mandatory policy provisions of S.C. Code Ann. § 56-9-20 (1991), which provides in pertinent part:

The following words and phrases when used in this chapter shall, for purposes of this chapter have the meanings respectively ascribed to ... them in this section, except in those instances where the context clearly indicates a different meaning:

* * *

(7) "Motor vehicle liability policy": An owner's or an operator's policy of liability insurance that fulfills all the requirements of §§ 38-77-140 through 38-77-230, certified as provided in § 56-9-550 or 56-9-560 as proof of financial responsibility and issued, except as otherwise provided in § 56-9-560, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person or persons named therein as insured, and any other person, as insured, using the vehicle described therein with the express

> or implied permission of the named insured, and subject to the following special conditions:
>
> • • •
>
> (b) Provisions deemed incorporated in such policy. Every motor vehicle liability policy is subject to the following provisions, which need not be contained therein:
>
> (1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by the motor vehicle liability policy occurs;
>
> • • •
>
> (3) No Statement made by the insured or on his behalf and no violation of the policy shall defeat or void the coverage....

(emphasis added).[1] Pennsylvania National basically takes issue with the finding by the circuit court that "the Automobile Reparation Reform Act incorporated by express reference the provisions of Chapter 9 of Title

---

[1] This provision has remained virtually unchanged since its initial enactment in 1952 and is now found in Chapter 9 of Title 56 (the Motor Vehicle Financial Responsibility Act). See Act No. 723 § 21, 1952 S.C. Acts 1853; S.C. Code Ann. § 46-702(7) (b) (3) (Supp. 1975).

Automobile Reparation Reform Act incorporated by express reference the provisions of Chapter 9 of Title 56." We need not decide whether the trial court was correct in this assertion, however. We hold on other grounds that a liability insurance policy required by statute before one can register a motor vehicle may not be defeated or voided after a loss by the insured's failure to forward to the insurer the pleadings in an action brought against the insured by a third party victim of the insured's negligence. See Rule 220(c), SCACR (the appellate court may affirm any ruling, order, or judgment upon any ground appearing in the Record on Appeal).

Prior to 1974 there was no requirement that all owners and operators of motor vehicles carry liability insurance. Barkley v. International Mut. Ins. Co., 227 S.C. 38, 86 S.E.2d 602 (1955). Owners and operators had to prove financial responsibility only after an accident resulting in liability or after accumulating too many traffic violation points. S.C. Code Ann. §§ 46-135 through 46-138.2 (1962); Act No. 311, 1959 S.C. Acts 567, § 14. One way to do so was by obtaining a certificate of insurance. See Act No. 723, § 18, 1952 S.C. Acts 1853; S.C. Code Ann. § 46-747 (1962). Accordingly, motor vehicle liability insurance was "voluntary" except where the statutes required a person to prove financial responsibility, and the person elected to do so by obtaining insurance. Even in this era of voluntary insurance, an insured's failure to forward suit papers to the insurer under a "voluntary" policy did not bar recovery by an innocent third party unless the insurer could show that the failure to give such notice resulted in substantial prejudice to its rights. Factory Mutual Liab. Ins. Co. v. Kennedy, 256 S.C. 376, 182 S.E.2d 727 (1971).

Our legislature recognized, however, that public liability insurance not only affords protection to insured motorists, but also serves the public purpose of affording protection to innocent victims of motor vehicle accidents. Factory Mutual Liab. Ins. Co. v. Kennedy; Evans v. American Home Assurance Co., 252 S.C. 417, 166 S.E.2d 811 (1969). Accordingly, the legislature enacted the Automobile Reparation Reform Act in 1974. See S.C. Code Ann. 56-11-10, et seq (repealed by 1987 Act No. 155 § 25(b) and recodified in Chapter 77 of Title 38 and Chapter 10 of Title 56) (Act. No. 155, § 9, 1987 S.C. Acts 385). Part of that Act, S.C. Code Ann. § 56-10-220 (1991), requires that every person applying to register a motor vehicle and obtain a license for the vehicle declare the vehicle to be insured and to furnish to the Department of Highways and Public Transportation "his certificate that such motor vehicle is an insured motor vehicle and that he will maintain insurance thereon during the registration period." Hence, the legislature decided that all vehicles registered and licensed in this State must be insured to the minimal coverage and limits required by the Motor Vehicle Financial Responsibility Act. With the passage of this Act, South Carolina became a mandatory insurance state.[2] Pennsylvania

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[2] South Carolina Code Ann. § 56-10-10 (1991) requires "security" before a motor vehicle may be registered in South Carolina. South Carolina Code Ann. § 56-10-20 (1991) provides that the security required by the Motor Vehicle Registration and Financial Security chapter of Title 56 is a policy of insurance which provides minimal coverage required by the Automobile Reparation Reform Act. However, the Executive Director of the Department of Highways and Public Transportation may approve and accept another form of security in lieu of a liability insurance policy upon

National Mut. Casualty Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). Compare Factory Mutual Liab. Ins. Co. v. Kennedy (noting that as of 1971, South Carolina was among those states which sought protection for highway victims, short of compulsory insurance, by the enactment of financial responsibility and uninsured motorist statutes, rather than compulsory liability insurance for all registered vehicles).

The public purpose of affording protection for innocent parties injured by another's negligence has long been a part of our law. In Ott v. American Fidelity & Casualty Co., 161 S.C. 314, 159 S.E. 635 (1931), the Supreme Court had before it a case involving a liability insurance policy issued in accordance with Section 5 of Act No. 170 of the 1925 Statutes, which required applicants for certificates of passenger carrying vehicles on public highways to procure liability insurance. The plaintiff sued a transit company for injuries the plaintiff received on the transit company's bus. The plaintiff also served the complaint on the insurance company. The circuit court granted non-suit for the insurer under a policy clause which provided that the insurer was not liable for any loss until a final judgment was recovered against an insured. After the plaintiff obtained a judgment against the transit company, he brought an action against the insurer to recover the amount of the judgment. The insurer raised as a defense the insured's failure to give immediate written notice of the plaintiff's claim, and asserted that it had no notice of the accident until served with the action against the insured. Both parties moved for directed verdict, but the circuit court

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finding that the alternative form of security adequately provides the benefits required by the chapter.

denied the motions. The jury found for the insurer, and the plaintiff appealed.

The Supreme Court held that the circuit court should have granted the plaintiff's motion for a directed verdict. The Court stated:

> [The insurer's] position would undoubtedly be correct in a suit brought against the insurer by the insured, but the same rule would not necessarily apply in a suit by an injured member of the public. We must assume that the policy was intended, not to evade, but to effectuate the purposes of the statute in compliance with which it was filed, and it must be construed in the light of such statute. The manifest purpose of the statute is the protection of passengers and members of the public who may be injured by negligence of bus operators, and a policy issued for such purpose must be construed most strongly against the insurer. * * *
>
> It is urged that it would work a great hardship on the insurer to require him to defend a case involving an accident as to the occurrence of which he has had no prior notice, as he would be thus deprived of an opportunity to adequately prepare his defense. The same point is raised and well answered in [Edwards v. Fidelity & Casualty Company, 11 La. App. 176, 123 So. 162 (1929)], in which the court said: "As to the hardship and disadvantage under which the insurer

> labors, and the difficulty under which the injured party finds himself, we think that the ends of justice require that the benefit of the doubt should be given to the injured party, who is in no way at fault, and whose loss was caused entirely by some one else, as against the insurer who has entered into the contract with full knowledge of the statute and for a monetary consideration."
>
> Furthermore, it appears to us that to allow the insured's failure to give notice of the accident to prevent the injured person's recovery would be to practically nullify the statute by making the enforcement of the rights of the person intended to be protected dependent upon the acts of the very person who caused the injury.

Id. at 317-319, 159 S.E. at 636-637.

The purpose of the Motor Vehicle Financial Responsibility Act and the Automobile Reparation Reform Act of 1974 is to afford greater protection to those injured through the negligent operation of automobiles in this State. Pennsylvania National Mut. Casualty Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). See also McAllister v. State Farm Mut. Auto. Ins. Co., 301 S.C. 113, 390 S.E.2d 383 (Ct. App. 1990) (noting that our Supreme Court has over the years adopted a policy of construing the Financial Responsibility Act strictly against insurers and liberally in favor of the insured in order to accomplish the purposes underlying the statute); Canal Insurance Co. v.

The Insurance Company of North America, Op. No. 23863 (S.C. Sup. Ct. filed June 1, 1993) (Davis Adv. Sh. No. 15 at 5) (noting that by enacting the minimal limits coverage statute now found in S.C. Code Ann. § 38-77-140 (1989), the legislature intended to mandate coverage for the benefit of the public). The legislature has expressed an intent to prohibit an insured's violation of the policy provisions from defeating or voiding coverage for third parties where the legislature deemed the coverage necessary to protect those third parties. Section 56-9-20(7). Prior to 1974 only those policies required for certain high risk drivers who would be prohibited from registering an uninsured vehicle were subject to this expression. After 1974, however, no one could lawfully register an uninsured vehicle since the legislature required all vehicles to carry liability insurance for the protection of third parties. Thus, the legislature has determined that for all vehicles registered in South Carolina, at least minimal coverage is necessary to protect the public. We hold that in accordance with the public purpose of protecting innocent third parties through mandatory insurance Weaver's violation of a provision of the policy providing this mandatory minimal coverage did not defeat or void that coverage.

Pennsylvania National argues that even after the 1974 Act, "voluntary" insurance policies existed in South Carolina, relying on the case of Merit Insurance Company v. Koza, 274 S.C. 362, 264 S.E.2d 146 (1980). We disagree. The accident in Koza occurred in October 1976, two years after the enactment of the Automobile Reparation Reform Act of 1974. The Court in Koza stated:

> It is important to note that the insurance policy in question is a

> "voluntary" automobile liability policy and, therefore, not controlled by the provisions of Section 56-9-20(7)(b), S.C. Code of Laws (1976). See Factory Liability Insurance Co. v. Kennedy, 256 S.C. 376, 182 S.E.2d 727 (1971); Evans v. American Home Assurance Co., 252 S.C. 417, 166 S.E.2d 811 (1969). As such, Merit has the benefit of asserting the insured's failure to comply with the policy provisions as a defense against actions brought by injured third parties if it has been substantially prejudiced by the insured's noncompliance. Factory Mutual Liability Insurance Co., supra.

274 S.C. at 364, 264 S.E.2d at 147.

We have examined the appellate record in Koza. See Stanley Smith & Sons, Inc. v. Dumas, Op. No. 2016 (S.C. Ct. App. filed Apr. 8, 1993) (Davis Adv. Sh. No. 14 at 20) (wherein this Court took notice of the contents of the appellate record in another, unrelated case). The policy in question in Koza was issued through a Michigan Agency and covered a vehicle registered in Florida. The policy was not issued under a compulsory insurance statute and, accordingly, was a "voluntary" policy. As the trial judge in Koza stated in ruling on the insurer's directed verdict motion, the policy was a "purely voluntary out of state contract" and was "not helped by a compulsory insurance act, such as South Carolina now has ...." The insurance policy in the case before us, however, was not a "voluntary" policy because it was required by the 1974 Automobile Reparation Reform Act. The policy provided minimal liability insurance required by law, and Weaver's breach of policy

conditions after the injury to Johnson did not bar recovery against Pennsylvania National by Johnson, the victim of the Weaver's negligence. See Evans v. American Home Assurance Co., 252 S.C. 417, 166 S.E.2d 811 (1969) (as to liability insurance which is required by law, a breach of policy conditions by the insured will not bar recovery against the insurer by the victim of the insured's negligence).

In conclusion, we hold, as a matter of public policy, the minimum limits automobile liability insurance policy involved in this case was not defeated or voided by Weaver's failure to comply with policy notice provisions after the accident resulting in Johnson's injuries, because the coverage was mandated by the legislature to protect innocent third parties, such as Johnson. Accordingly, the judgment is

AFFIRMED.

Gardner and Bell, JJ., concur.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	Case No.: 90-CP-21-1597
Linda Johnson Shores, Personal Representative of the Estate of Kenneth Johnson,	
Plaintiff,	ORDER
-vs-	FILED December 19, 1991
Mitchell L. Weaver and Pennsylvania National Mutual Casualty Insurance Company,	
Defendants.	

This matter is before me on cross-motions for summary judgment made by the plaintiff and the defendant Pennsylvania National Mutual Casualty Insurance Company. The issue is whether the defendant Weaver's failure to notify the defendant insurer, his automobile liability carrier, of a tort action taken against him by passenger Kenneth Johnson[1] will excuse the insurer's obligation to provide policy benefits.

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[1] Johnson's estate now holds a default judgment against Weaver in the amount of $250,000.

Prior to the Automobile Reparation Reform Act of 1974[2] there was no law requiring the owners and operators of motor vehicles to carry liability insurance. See State Farm Mutual Automobile Insurance Company v. Cooper, 233 F.2d 500, 501 (4th Cir. 1956); Barkley v. International Mutual Insurance Company, 227 S.C. 38, 86 S.E.2d 602 (1955). Prior to 1974, under the South Carolina Motor Vehicle Safety Responsibility Act[3] and the South Carolina Uninsured Motorist Act[4], the owner or operator of a motor vehicle only had to prove financial responsibility after an accident resulting in liability[5]; to encourage the purchase of liability insurance and protect uninsured motorists, the Uninsured Motorist Act required those persons registering and licensing an uninsured vehicle to pay a fee into the uninsured motorist fund. See American Liberty Insurance Company v. Dewitte, 236 F.Supp. 636, 639 (D.S.C. 1964). Thus, motor vehicle liability insurance prior to 1974 was voluntary as both parties to

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[2] Codified at §56-10-10 et. seq. of the South Carolina Code (1976).

[3] Now known as the "Motor Vehicle Financial Responsibility Act" and frequently referred to simply as the "Financial Responsibility Act." S.C. Code §§ 56-9-10 et. seq.

[4] Sections 46-135 through 46-138.2 of the 1962 Code, repealed by the Automobile Reparation Reform Act of 1974, Act 2718 of the 58th General Assembly.

[5] Section 46-722 of the 1962 Code, repealed by the Automobile Reparation Reform Act of 1974, Act 2718 of the 58th General Assembly.

a policy of insurance at that time would have known.[6]

With the passage of the Automobile Reparation Reform Act of 1974, the rules changed; South Carolina became a compulsory insurance state mandating that every owner of a motor vehicle carry basic liability insurance with minimum coverage limits[7]. The only voluntary coverages now are those in excess of basic liability and uninsured requirements[8]. Accord Universal

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[6] In contrast, liability insurance after 1974 was mandatory as both parties to an insurance policy would also know. Although the defendant insurer's memorandum briefly suggests that a strict application of the Financial Responsibility Act to liability policies would deny the insurer constitutional due process and contract rights, this contention was not argued and is without merit; automobile insurers who write policies in this state have full notice in both the statutory and case law of the mandatory nature of certain coverages and undoubtedly set their rate schedules based on those legal requirements.

[7] Pennsylvania National Mutual Casualty Insurance Company, of all companies, should know this given its experience with the South Carolina Appellate Courts. See Pennsylvania National Mutual Casualty Insurance Company v. Parker, 282 S.C. 546, 320 S.E.2d 458 (1984).

[8] Although Merritt Insurance Company v. Koza, 274 S.C. 362, 264 S.E.2d 146 (1980), seems to be to the contrary, it is not; a complete review of the record should reveal that Koza involved an out-of-state liability policy covering vehicles in South Carolina for the Laurens County fair, but this fact does not appear in the Supreme Court's opinion.

Underwriters v. Metropolitan Property and Life, 298 S.C. 411, 380 S.E.2d 858 (Ct. App. 1989) (applying S.C. Code §56-9-20(7)(d) (excluding excess coverage from statutory provisions)); see also Garris v. Cincinnati Insurance Company, 280 S.C. 149, 311 S.E.2d 723 (1984) (underinsured coverage is voluntary although it must be offered). The public policy behind such compulsory insurance is to assure protection for the innocent victims of motor vehicle accidents[9].

Although now codified at §38-77-140 of the code, the minimum liability requirements were formerly found in Chapter 9 of Title 56 (the Financial Responsibility Act) and the Automobile Reparation Reform Act incorporated by express reference the provisions of Chapter 9 of Title 56. Indeed, at the time of this accident, the minimum liability requirements were found at §56-9-820 of the South Carolina Code and the definition found in § 56-9-20 (7) of "motor vehicle liability policy" would apply.

Relying on old cases made moot by the 1974 Act, Pennsylvania Mutual would now have the court believe there are two standards for automobile liability policies: those "certified" under Chapter 9 of Title 56[10] and

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[9] There are numerous cases which recognize this policy and interpret the legislation in accordance therewith; these cases are well represented in the plaintiff's memorandum filed with the court.

[10] The word "certified" as used in § 56-9-20(7) relates back to the pre-compulsory insurance period and although some situations still may require "certified" insurance (defense counsel mentioned SR-22 policies), it is clear that the definition and requirements of

those required of owners and operators under Chapter 10 of Title 56; not only is this position unreasonable in light of the statutory history, it is absurd in light of the clear case law applying the Financial Responsibility Act. The minimum mandatory coverage required of all vehicle owners and operators, such as that required of Mitchell Weaver in this case, must satisfy the Financial Responsibility Act which expressly provides for limited exclusions from coverage.

The notes following Section 38-77-140 of the code provides cross reference to §56-9-20(7) for the definition of "motor vehicle liability policy" and this is precisely what the courts have applied. Thus, the Financial Responsibility Act has been applied to require coverage even when the liability was created by an intentional tort, South Carolina Farm Bureau Mutual Insurance Company v. Mumford, 299 S.C. 14, 382 S.E.2d 11 (Court of Appeals 1989), or created by one employed in the "automobile business," Farmland Mutual Insurance Company v. Jim Moore Cadillac Olds, Inc., 283 S.C. 333, (Court of Appeals 1984), or created by "business or commercial" use. Pennsylvania National Mutual and Casualty Insurance Company v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Court of Appeals 1984).

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mandatory, minimum, motor vehicle liability insurance are controlled by the Financial Responsibility Act. See, e.g., South Carolina Farm Bureau Mutual Insurance Company v. Mumford, 299 S.C. 14, 382 S.E.2d 11 (Court of Appeals 1989); Farmland Mutual Insurance Company v. Jim Moore Cadillac Olds, Inc., 283 S.C. 333 (Court of Appeals 1984); Pennsylvania National Mutual and Casualty Insurance Company v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Court of Appeals 1984).

Accordingly, this court concludes that an insurer cannot escape its liability under the mandatory minimum set by the Automobile Reparation Reform Act of 1974 and incorporated into the Motor Vehicle Financial Responsibility Act;[11] this conclusion is consistent with the language of the South Carolina Supreme Court in Ott v. American Fidelity and Casualty Company, 161 S.C. 314, 159 S.E. 635 (1931), which held that an insured's failure to give notice of an accident would not excuse or void the policy coverage because the insurance coverage was mandatory for passenger carrying vehicles. The plaintiff's motion for summary judgment is granted; judgment shall be entered in favor of the plaintiff against the defendant Pennsylvania National Mutual Casualty Insruance Company in the amount of $15,000.

AND SO IT IS ORDERED.

A. Victor Rawl
A. VICTOR RAWL, PRESIDING JUDGE OF THE TWELFTH JUDICIAL CIRCUIT

Florence, South Carolina,
December 18, 1991.

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[11] Because this court has concluded that a mandatory minimum insurer may not exclude coverage inconsistent with the Financial Responsibility Act, it need not reach the issue of whether the defendant insurer has been irreparably prejudiced by the failure of its insured to comply with policy provisions. Arguably, any prejudice suffered by the insurer could be cured by reopening the underlying tort action for disposition. Moreover, the defendant insurer admits to having notice of the nature and extent of the claim and, therefore, had an opportunity to prepare itself for possible litigation.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	Case No.: 90-CP-21-1597
Linda Johnson Shores, Personal Representative of the Estate of Kenneth Johnson,	
Plaintiff,	ORDER
-vs-	FILED January 9, 1992
Mitchell L. Weaver and Pennsylvania National Mutual Casualty Insurance Company,	
Defendants.	

This matter was before the Court pursuant to a Motion for Reconsideration by the Defendant of the Order of the Court filed December 19, 1991 granting Summary Judgment in favor of the Plaintiff against the Defendant in the amount of $15,000.00.

After full and complete consideration of the Defendant's Motion it is the decision of the Court that it be denied.

IT IS THEREFORE ORDERED that the Defendant's Motion for Reconsideration of the Order of the Court dated December 19, 1991 be denied.

AND SO IT IS ORDERED.

A. Victor Rawl
A. Victor Rawl
Judge, Ninth Judicial Circuit

Charleston, South Carolina
January 6, 1992

The South Carolina Court of Appeals

Reba D. Mims
Clerk

P.O. Box 11629
Columbia, SC 29211
(803) 734-1890

Ida R. Carson
Deputy Clerk

August 19, 1993

Charles E. Carpenter, Jr., Esquire
Messrs. Richardson, Plowden, Grier & Howser
P.O. Drawer 7788
Columbia, South Carolina 29202

Re: Linda Johnson Shores, etc. v.
Pennsylvania National Mutual
Casualty Insurance Company

Dear Mr. Carpenter:

Your Petition for Rehearing has been denied in the following Order:

"Petition denied.

s/Randall T. Bell, J.
s/C. Tolbert Goolsby, Jr., J.
s/Bruce Littlejohn, A.J.

Columbia, South Carolina
August 19, 1993."

Since Judge Gardner is no longer with the Court of Appeals, Judge Goolsby has reviewed the record and acted on the Petition for Rehearing.

The Remittitur will be held for a period of thirty days until the time to Petition for Writ of Certiorari has expired, after which it will be forwarded to the trial court.

Sincerely,

Reba D. Mims
Clerk

RDM\jsc
cc: The Honorable Clyde N. Davis, Jr.
Deborah L. Harrison, Esquire
William H. Hensel, Esquire
Jon Rene Josey, Esquire

The Supreme Court of South Carolina

Clyde N. Davis, Jr.
Clerk of Court
Brenda F. Shealy
Deputy Clerk

P.O. Box 11330
Columbia, SC 29211
(803) 734-1080

March 18, 1994

Charles E. Carpenter, Jr., Esquire
Deborah L. Harrison, Esquire
William H. Hensel, Esquire
P.O. Drawer 7788
Columbia, S. C. 29202

Re: Linda Johnson Shores, etc. v.
Mitchell L. Weaver, et al.

Dear Ms. Harrison and Gentlemen:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied.

s/A. Lee Chandler, A.C.J.
for the Court

Chief Justice David W.
Harwell, not participating

March 18, 1994."

Please advise the Court of what disposition you would have us make of the extra copy of the record in this matter. If we have not heard from you to the contrary, we willl destroy the record on March 28, 1994.

Very Truly Yours,

Brenda F. Shealy
DEPUTY CLERK

BFS\dmh

Copy to: Jon Rene Josey, Esquire

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	
Linda Johnson Shores, Personal Representative of the Estate of Kenneth Johnson,	
Plaintiff,	Case No.: 90-CP-21-1597
-vs-	MOTION FOR RECONSIDERATION
Mitchell L. Weaver and Pennsylvania National Mutual Casualty Insurance Company,	
Defendants.	

This matter came before the Court on cross motions for summary judgment. Plaintiff sought to declare coverage for a default judgment entered against Mitchell Weaver in an automobile negligence action brought by Kenneth Johnson under a Pennsylvania National Policy issued to Weaver, and the Defendant Pennsylvania National sought to declare that there was no coverage because Weaver breached the Policy by not forwarding the suit papers. By Order dated December 19, 1991, and received by Counsel for Defendant Pennsylvania National on December 23, 1991, the Court issued an order granting summary judgment in favor of

Plaintiff. Defendant respectfully requests that the Court 7reconsider its Order for the foregoing reasons:

1. The Court overlooked the fact that the Legislature retained the provisions of Chapter 9 after the codification of the Reparation Act in 1974 and the recodification in 1987, and the fact that the Legislature recognizes a certified "motor vehicle liability policy" under Section 56-9-20(7) as different from an ordinary automobile insurance policy.

The "Financial Responsibility Act" is Chapter 9 of Title 56, which chapter deals with specific insurance requirements under certain limited circumstances as discussed in more detail in Defendant's Memorandum in Support of Summary Judgment. In circumstances where there is a known or perceived higher risk, the Legislature requires owner/operators to take extra steps in procuring liability insurance to protect third parties. In addition to meeting all the usual requirements for automobile policies found in Title 38, the Policy is subject to certain special conditions, including the condition that "no violation of the policy shall defeat or void the policy." Section 56-9-20(7)(c).

Chapter 10, formerly Chapter 11, of Title 56, contains the Automobile Reparation Reform Act of 1974, with provisions requiring motor vehicle owners to maintain "security" as a precondition to registration of a vehicle. "Security" includes a policy providing for the minimum coverages specified in Section 38-77-140 through 38-77-230 and the benefits required under Sections 38-77-240, 250, and 260. Chapter 10 does not require every owner to procure a certified motor vehicle liability policy as defined in Section 56-9-20(7). And the special condition of Section 20(7)(c) of the Financial

Responsibility Act applies only to certified policies. Despite the fact that Chapter 11, and now Chapter 10, required all vehicle owners to maintain security, Section 20(7) still stands apart from that requirement. Certified policies are separate and distinct from those general policies contemplated in Chapter 10 and 11. And while a Chapter 9 certified policy may not be voided for breach of a notice/forwarding provision, nothing in Chapter 10 and 11, or the pertinent provisions of Title 38 places limits such as the condition in Section 56-9-20(7)(c) on every ordinary automobile insurance policy.

Further, as our Supreme Court has acknowledged, the General Assembly did not intend to hold insurers liable without notice or opportunity to contest a claim on its policy. Hatchett v. Nationwide Mutual Ins. Co., 244 S.C. 425, 137 S.E.2d 608, 612 (1964). There, the Court held that Nationwide could deny recovery under a "mandatory" uninsured endorsement based on the insured's failure to give written notice of the accident as soon as practicable. The Court held that the policy provision requiring notice did not conflict with the terms of the Act and were valid, stating:

> Although the Act contains the phrase "nor may anything be required of the insured except the establishment of legal liability," the legislature never intended by this language to hold an insurance company liable without notice or opportunity to investigate or contest the claim.

Id.

Likewise, the Legislature never intended an insurance company to be absolutely liable on every automobile policy it issues for default judgments

rendered against its insureds, when the insurance company never receives the suit papers. With certified policies, the insurance company may be so absolutely liable, but such a special policy is not required on every automobile owner. A certified policy is only required of certain high risk operators/owners, and those insureds pay a higher premium for such absolute liability.

2. The trial court misapplied the Ott case to the facts in this case. There, the Court held that the insured's violation of the notice provision of a mandatory policy issued to a motor carrier certified by the Public Service Commission could not bar recovery by an injured third party. The mandatory policy in Ott is similar to a certified policy under Section 56-9-20(7) in that a policy must be filed with the PSC. 1925 S.C. Act No. 170, currently, S.C. Code Ann. § 58-23-910; see also PSC Reg. 103-171. Similar to Section 56-9-20(7)(c), PSC Regulation 103-107 provides that "no violation of any of the provisions of the policy or bond or of any endorsement attached thereto, shall relieve the insurance or bonding company from liability under the policy or bond or from the payment of any final judgment recovered against the insured."

The policy in question here is not a certified policy, and Weaver's breach of the forwarding provision of the policy should be enforced to bar recovery thereunder.

3. In footnote 11 of the Order, the Trial Court erred in proposing that Defendant had not been "irreparably prejudiced" because any prejudice could be cured by reopening the underlying tort action for disposition. First, the Court applied the wrong standard of prejudice. A defendant insurer does not have to

establish "irreparable prejudice." The Supreme Court has held that an insurer is required to establish "substantial prejudice." Factory Mutual Liability Ins. Co. v. Kennedy, 256 S.C. 376, 182, 727 (1971).

Further, the Court also held that a default judgment is proof of substantial prejudice as a matter of law. Merit Ins. Co. v. Koza, 274 S.C. 362, 264 S.E.2d 146 (1980). The Court specifically held in Koza that it does not matter whether the insurer had notice of the suit if the papers were not forwarded.

Finally, the default judgment cannot be reopened at this late date. The statute of limitations has run and the insurer has destroyed its files.

4. The Court failed to address Defendant's argument that its due process and contract clause rights are violated if its contract provision requiring forwarding of suit papers is not enforced.

For these reasons and those further presented in Defendant's Memorandum in Support of Summary Judgment, Defendant respectfully requests that the Court reconsider its decision and issue an amended order granting summary judgment in favor of Defendant Pennsylvania National.

Respectfully submitted,

Deborah L. Harrison

William H. Hensel
Deborah L. Harrison
RICHARDSON, PLOWDEN, GRIER & HOWSER
1600 Marion St.

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ATTORNEYS FOR DEFENDANT
PENNSYLVANIA NATIONAL

January 2, 1991.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	
Linda Johnson Shores, Personal Representative of the Estate of Kenneth Johnson,	
Plaintiff,	Case No.: 90-CP-21-1597
-vs-	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Mitchell L. Weaver and Pennsylvania National Mutual Casualty Insurance Company,	
Defendants.	

This case involves a question of insurance coverage for a default judgment obtained by Plaintiff Johnson arising from an accident with Pennsylvania National's policy holder, Defendant Weaver. Pennsylvania National denies coverage to Weaver, its automobile insurance policy holder, for failure to notify Pennsylvania National of civil action or to forward the suit papers as required by the Policy. Weaver did not tell Pennsylvania National that he had been sued and did not send Pennsylvania National the complaint. Weaver failed to answer on his own behalf and a default judgment was entered against him.

South Carolina has held that an insured's breach of duty to comply with the notification and cooperation requirements of an insurance policy contract bars recovery. Squires v. National Grange Mutual Ins. Co., 247 S.C. 58, 145 S.E.2d 673, 677 (1965). The Plaintiff does not contest that failure to notify and the Plaintiff does not dispute the prejudice by the breach. Plaintiff argues that the statutory certified policy mandated for those who have had a license suspended may not be voided by a breach of the policy by the insured. Plaintiff therefore argues by analogy that the Policy issued by Pennsylvania National to Weaver may not be void by the policy holder's breach of contract. There is no basis in the statute or the case law to support the plaintiff's argument. The Pennsylvania National Policy is not a certified policy subject to the mandatory certified policy provisions of the statute. It is a standard voluntary policy and the insured's failure to notify or cooperate breaches that contract. There is no coverage.

FACTS

Plaintiff Johnson was a passenger in the bed of a pick-up truck owned and driven by Defendant Weaver, and he was injured in an accident which occurred on August 13, 1983. The truck was insured by Defendant Pennsylvania National under policy number 102755523. The limits of coverage were $15,000.00.

Pennsylvania National was notified of the accident on or about August 17, 1983. Pennsylvania National assigned adjustment of the loss to Crawford and Company in Florence, South Carolina. On or about October 31, 1983, Attorney Marvin P. Jackson, Jr., notified Crawford and Company that he represented the Plaintiff. Communications were exchanged between

Plaintiff's counsel and Crawford, the last of which was a letter from Plaintiff's counsel, dated February 14, 1984. In that letter, Plaintiff's counsel made an offer of settlement and advised Crawford that suit would be filed if payment was not made within ten days. That was the last that Crawford or Pennsylvania National heard from Plaintiff until this declaratory judgment action was served upon Pennsylvania National in December 1990.

Unbeknownst to Pennsylvania National, Plaintiff had filed and served an action against Weaver on May 7, 1986. Weaver did not forward the summons and complaint or otherwise notify Pennsylvania National of the suit. Nor did Plaintiff's counsel send Crawford and Company a copy.

Weaver failed to answer and default was entered. [Order for Judgment as to Liability, Judge C. Anthony Harris, filed January 12, 1987.] A damages hearing was held on December 17, 1987. Weaver appeared in person, but did not notify Pennsylvania National of the hearing. Nor did Plaintiff's counsel notify Pennsylvania National of the hearing. Judge W. Frank Rogers, Jr. awarded Plaintiff $250,000.00. [Order of Judgment, dated January 21, 1988.] Judgment was entered on January 27, 1988.

Pennsylvania National was not given notice of the entry of default or the damages hearing. Nor was Pennsylvania National given notice of the Order or the Judgment. After six years had elapsed since the accident and having never been notified of any suit, Pennsylvania National and Crawford and Company destroyed their files in the matter since the statute of limitations had run.

DISCUSSION

The sole issue on the cross motions for summary judgment before the court is whether the Pennsylvania National Policy is a voluntary policy or is it a mandatory "motor vehicle liability policy" under the Financial Responsibility Act? Pennsylvania National maintains that the policy is a voluntary policy; it is not a policy certified as proof of financial responsibility. Therefore, the Pennsylvania National request that the Court declare that recovery on behalf of Plaintiff Johnson against the policy is barred and grant summary judgment as to Plaintiff's action.

It is well settled that where a policy requires the insured to forward suit papers and compliance with such provision is a condition precedent to the insurance company's liability on the policy, the insured's breach in such respect will bar recovery under the policy unless the company waives the breach. Hatchett v. Nationwide Mutual Ins. Co., 244 S.C. 425, 137 S.E.2d 608, 613 (1964); Squires v. National Grange Mutual Ins. Co., 247 S.C. 58, 145 S.E.2d 673, 677 (1965).

To bar the rights of an innocent third party to recover under a policy, the breach must have resulted in substantial prejudice to the insurance company's rights. Squires, 145 S.E.2d at 677; Factory Mutual Liability Ins. Co. v. Kennedy, 256 S.C. 376, 182 S.E.2d 727, 729-30 (1971). The South Carolina Supreme Court has held that substantial prejudice is established by entry of a default judgment against the insured. Merit Ins. Co. v. Koza, 274 S.C. 362, 264 S.E.2d 146 (1980). The Plaintiff does not dispute that failure to notify Pennsylvania National of the lawsuit constitutes substantial prejudice.

The Pennsylvania National Policy clearly provides that: "A person seeking any coverage must ... promptly send us copies of any notices or legal papers received in connection with the accident or loss." Part E - Duties After an Accident or Loss, Page 8 of 10. The Policy also provides that: "no legal action may be brought against us until there has been full compliance with all the terms of this policy." Part F - General Provisions, Page 9 of 10.

Plaintiff Johnson does not dispute that Weaver failed to forward the summons and complaint or any of the other suit papers. Nor does Johnson dispute that Pennsylvania National has been substantially prejudiced by such breach as clearly established by the entry of a default judgment. Johnson contends that the Pennsylvania National policy is a mandatory policy under the Financial Responsibility Act, and that Pennsylvania National cannot deny coverage based on Section 56-9-20(7)(b)(3) of the Act which provides that: "No statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy."

Pennsylvania National maintains that: (1) the policy issued to Weaver is not a mandatory policy; (2) Section 56-9-20(7)(b)(3) only applies to a "motor vehicle liability policy" as defined in the Act; and (3) the policy issued to Weaver is not a mandatory or certified policy as defined in the Act. Therefore, recovery under the Policy can be barred by Weaver's breach. Pennsylvania National also maintains that the policy provision is enforceable even if the policy is a mandatory policy.

The Financial Responsibility Act, S.C. Code Ann. §§ 56-9-10 et seq., does not require every driver or owner to maintain motor vehicle liability coverage. It is

only after an accident[1] or after suspension of a driver's license[2] that a driver must secure a liability policy to cover accidents in the future or furnish proof of financial responsibility. Sections 56-9-350, 56-9-550.

Section 56-9-540 provides that financial responsibility may be proven by filing a certificate of insurance as provided in Sections 56-9-550 or 56-9-560. Section 56-9-550 provides that proof of financial responsibility may be furnished by filing a written certificate of any insurance carrier that there is in effect a "motor vehicle liability policy."

A "motor vehicle liability policy" required under the Act is a specific type of policy, defined in the Act as:

> an owner's or an operator's policy of liability insurance that fulfills all the requirements of §§ 38-77-140 through 39-77-230, **certified as provided in § 56-9-550 or 56-9-560 as proof of financial responsibility** and issued, except as other

---

[1]Section 56-9-350 provides that after an accident involving bodily injury or death or more than $400,000 in property damage, the operator or owner of the vehicle must prove that they have liability insurance coverage. If there is no coverage, the driver's license will be suspended. Section 56-9-351; see also Section 56-9-352.

[2]Section 56-9-500 provides that whenever a driver's license is suspended or revoked, any registration shall also be suspended in the absence of proof of financial responsibility. The driver's license will not be reinstated without proof of financial responsibility.

> provided in § 56-9-560, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person or persons named therein as insured, and any other person, as insured, using the vehicle described therein with the express or implied permission of the named insured, and subject to the following special conditions:
>
> ****
>
> (b)(3) No statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy.

In Southern Farm Bureau Cas. Ins. Co. v Fulton, 244 S.C. 559, 137 S.E.2d 769, 771 (1964), the Court stated that "the compulsions of our financial responsibility act, do not apply to policies which have not been certified as proof of financial responsibility." Again, in Factory Mutual v. Kennedy, 182 S.E.2d at 729, the Court noted that Section 56-9-20(7)(b) [formerly § 46-702(7)(b) (1962 Code)] only applies to certified policies. See also American Liberty Ins. Co. v. DeWitte, 236 F. Supp. 636 (D.S.C. 1964). Most recently in Merit Ins. Co. v. Koza, 274 S.C. 362, 264 S.E.2d 146 (1980), the Supreme Court noted the difference between a "voluntary policy" and a certified policy under Section 56-9-20(7)(b).

The Pennsylvania National Policy was not a certified policy. Therefore, the Policy was not a "motor vehicle liability policy" which cannot be voided by noncompliance with the express terms of the Policy.

Therefore, recovery is barred under the Policy by Weaver's breach.

Plaintiff's reliance on the cases cited in his Memorandum is misplaced. In Ott v. American Fidelity & Casualty Co., 161 S.C. 314, 159 S.E. 635 (1931), the Supreme Court held that an insured's failure to give notice of an accident would not bar recovery by the injured party because the insurance coverage was mandatory under a specific statute governing "every applicant for a certificate for passenger carrying vehicles." In Evans v. American Home Assurance Co., 252 S.C. 417, 166 S.E.2d 811, 812 (1969), the Supreme Court noted the difference between the mandatory coverage involved in Ott and the voluntary coverage under the Financial Responsibility Act:

> As to liability insurance which is required by law, we have held that a breach of policy conditions by the insured after the injury will not bar recovery against the insurer by the victim of the insured's negligence. Ott v. American Fidelity & Cas. Co. .... Our statute so provides as to a certified policy under the Motor Vehicle Responsibility Act, [Section 56-9-20(7)(b)].

166 S.E.2d at 812. However, the same rule does not apply to a voluntary policy.

Here, the policy was not a certified policy under the Act. It was a voluntary policy. Therefore, Weaver's breach of the policy which resulted in the default judgment bars recovery by Johnson.

In South Carolina Farm Bureau Mutual Ins. v. Mumford, 299 S.C. 14, 382 S.E.2d 11 (Ct. App. 1989), the Court of Appeals held that an intentional act exclusion in a liability policy was invalid because Section 38-77-140 requires insurers to cover against "loss from liability imposed by law" without distinction as to intentional versus negligent acts. The decision in Mumford is inapplicable in this case because there is a distinction between a driver/owner's voluntary procurement of a liability policy and mandatory provisions which the insurer must place in such a voluntary policy. The Supreme Court's statement in Hatchett, supra, aptly points out the distinction between Mumford and this case:

> Although the policy was voluntarily procured by plaintiff, under the provisions of Section 46-750.14 it is mandatory that all bodily injury liability insurance and property damage liability insurance issued or delivered in this State contain an endorsement or provisions to comply with the Uninsured Motorist Act.

137 S.E.2d at 611.

Moreover, Plaintiff's contention that every policy is a mandatory policy subject to Section 56-9-20((7)(b) is irreconcilable with the Supreme Court's decisions. In Merit Ins. Co. v. Koza, supra, the Supreme Court found it important to note that the insurance policy in question was a voluntary automobile liability policy and not controlled by the provisions of Section 56-9-20(7)(b). If Plaintiff's contention was correct, then there would be no such thing as a voluntary automobile liability policy.

Plaintiff's contention cannot be harmonized with the Supreme Court decisions.

Finally, even if the policy was mandatory, recovery should still be barred because, as our Supreme Court has acknowledged, the General Assembly did not intend to hold insurers liable without notice or opportunity to contest the claim. Hatchett, 137 S.E.2d at 612. There, the Court held that Nationwide could deny recovery under a "mandatory" uninsured endorsement in a voluntary policy based on the insured's failure to give written notice of the accident as soon as practicable. The Court held that the policy provision requiring notice did not conflict with the terms of the Act and were valid, stating:

> Although the Act contains the phrase "nor may anything be required of the insured except the establishment of legal liability," the legislature never intended by this language to hold an insurance company liable without notice or opportunity to investigate or contest the claim.

Any such attempt by the Legislature to impose absolute liability on an insurer regardless of the terms of a contract voluntarily entered into with the insured would present serious due process and contract clause problems. If Plaintiff's contentions were correct, then an Insurance Company could be forced to pay without ever having had notice and an opportunity to be heard -- basic due process rights. However, such problems need not arise here because neither the statute nor the case law support Plaintiff's contention that the provisions of this voluntary policy are unenforceable. Weaver breached the Policy by failing to notify Pennsylvania

National of the suit or forward the papers. Therefore, recovery on the Policy is barred.

CONCLUSION

As a condition precedent to recovery under the Policy, Weaver was required to forward all suit papers. Weaver did not forward the summons and complaint, the notice of the default hearing, or a copy of the default judgment. Therefore, recovery is barred on the policy.

Based on the foregoing, Pennsylvania National respectfully requests that this Court grant summary judgment in its favor against Plaintiff Johnson.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

December 17, 1991

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

A. Victor Rawl, Circuit Court Judge
Civil Action No. 90-CP-21-1597
Docket No. 92-612

Linda Johnson Shores,
Personal Representative
of the Estate of Kenneth
Johnson, **RESPONDENT,**

v.

Mitchell L. Weaver and
Pennsylvania National
Mutual Casualty Insurance, Defendants,

OF WHOM

Pennsylvania National
Mutual Casualty
Insurance Company is **APPELLANT.**

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

Does an automobile liability insurer have to pay a default judgment entered against its insured in favor of a third party when the insured never notified the insurer of the lawsuit nor forwarded any of the legal papers as expressly required under the terms of the policy?

OR AS OTHERWISE STATED:

Does Section 56-9-20(7)(b)(3) which provides that "no violation of the policy shall defeat or void the policy" apply to all automobile liability insurance policies, or only to the special certified "SR-22 type" policies required of certain high-risk drivers as proof of financial responsibility under Chapter 9 of Title 56?

STATEMENT OF THE CASE

Introduction

This case involves a question of insurance coverage for a default judgment obtained by Kenneth Johnson arising from an accident with Pennsylvania National's policy holder, Mitchell Weaver. Pennsylvania National denies coverage based on Weaver's failure to notify Pennsylvania National of Johnson's civil action or to forward the suit papers as required by the Policy. Weaver also failed to answer on his own behalf and a default judgment was entered against him. The Trial Court held that an insurer cannot deny liability based on an insured's failure to give notice of a civil action or to forward suit papers. Pennsylvania National respectfully submits that the terms of the Policy issued to Weaver are valid and enforceable, and that the Trial Court's decision should be reversed.

Background Facts

Johnson was injured in an accident which occurred on August 13, 1983, while he was a passenger in a pick-up truck owned and driven by Weaver. [R. 21; Affidavit of Marvin Jackson.] The truck was insured by Pennsylvania National under policy number 102755523. [R. 27; Affidavit of Harold Powers with Attachment.] The limits of coverage were $15,000.00. The Policy clearly provides that the insured must promptly forward to the Company any legal papers in connection with an accident or loss and that legal action cannot be maintained against the Company unless the insured fully complies with such condition. [R. 43; Policy, p. 9.]

Pennsylvania National was notified of the accident on or about August 17, 1983. [R. 27, 55; Affidavits of Harold Powers and Thomas Corbett.] Pennsylvania National assigned adjustment of the loss to Crawford and Company in Florence, South Carolina. On or about October 31, 1983, Attorney Marvin P. Jackson, Jr., notified Crawford and Company that he represented the Plaintiff. [R. 21; Affidavit of Marvin Jackson.] Communications were exchanged between Plaintiff's counsel and Crawford, the last of which was a letter from Plaintiff's counsel, dated February 14, 1984. In that letter, Plaintiff's counsel made an offer of settlement and advised Crawford that suit would be filed if payment was not made within ten days. That was the last that Crawford or Pennsylvania National heard from Plaintiff until this declaratory judgment action was served upon Pennsylvania National in December 1990.

Unbeknownst to Pennsylvania National, Plaintiff had filed and served an action against Weaver on May 7, 1986. Weaver did not forward the summons and complaint or otherwise notify Pennsylvania National of the suit. Nor did Plaintiff's counsel send Crawford and Company a copy. [R. 27, 55; Affidavits of Powers and Corbett.]

Weaver failed to answer and default was entered. [R. 57; Order for Judgment as to Liability, Judge C. Anthony Harris, filed January 12, 1987.] A damages hearing was held on December 17, 1987. Weaver appeared in person, but did not notify Pennsylvania National of the hearing. Nor did Plaintiff's counsel notify Pennsylvania National of the hearing. Judge W. Frank Rogers, Jr., awarded Plaintiff $250,000.00. [R. 60; Order of Judgment, dated January 21, 1988.] Judgment was entered on January 27, 1988.

Pennsylvania National was not given notice of the entry of default or the damages hearing. Nor was Pennsylvania National given notice of the Order or the Judgment. After six years had elapsed since the accident and having never been notified of any suit, Pennsylvania National and Crawford and Company destroyed their files in the matter since the statute of limitations had run. [R. 27, 55; Affidavits of Powers and Corbett.]

Procedural History

Linda Johnson Shores, the personal representative of the estate of Kenneth Johnson, filed this action on December 14, 1990, seeking a declaration of coverage under the Pennsylvania

National policy for the default judgment against Weaver. [R. 8; Complaint.] Pennsylvania National filed its answer on January 18, 1991. [R. 11; Answer.]

Plaintiff moved for summary judgment on August 5, 1991. [R. 13; Plaintiff's Motion for Summary Judgment.] Pennsylvania National also filed a Motion for Summary Judgment on August 21, 1991. [R. 14; Defendant's Motion for Summary Judgment.]

The cross motions for summary judgment were heard by the Honorable C. Victor Rawl on December 17, 1991. The Trial Court issued its opinion on December 19, 1991, which was received by Defense Counsel on December 23, 1991. [R. 1; Order.]

Pennsylvania National served a Motion for Reconsideration on January 2, 1991. [R. 16; Motion for Reconsideration.] The Trial Court denied the Motion for Reconsideration by order filed January 9, 1992. [R. 7; Order.]

Pennsylvania National served and filed a Notice of Appeal on February 5, 1992.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court has held that a third party cannot recover under an insurance policy if the insurance company's rights have been substantially prejudiced by the insured's breach of duty to comply with the notification and cooperation requirements of the insurance policy. There is no dispute that Weaver failed to forward the suit papers or otherwise notify Pennsylvania National of the lawsuit filed by Johnson. Nor did Plaintiff contest that Pennsylvania National was substantially prejudiced by Weaver's breach of the Policy provisions.

Notwithstanding these undisputed facts, the Trial Court held that the Policy issued by Pennsylvania National to Weaver may not be voided by Weaver's breach of contract. The Trial Court relied upon S.C. Code Ann. § 56-9-20(7)(b)(3) which provides that certified "SR-22 type" policies may not be voided by the insured's breach of the policy conditions. The Trial Court held that the provisions of Subsection 20(7)(b)(3) also apply to all automobile liability policies because the Automobile Reparation Reform Act of 1974, as currently codified in Chapter 10 of Title 56, compels all registered car owners to carry basic liability insurance. Pennsylvania National submits that the Trial Court erred in its holding because the Policy issued to Weaver is not a certified policy subject to the mandatory policy provisions of Subsection 20(7)(b)(3).

The Reparation Act, as currently codified in Chapter 10 of Title 56, requires that every registered car must be insured. Portions of the Motor Vehicle

Safety Responsibility Act, now codified in Chapter 77 of Title 38, impose certain requirements upon all automobile policies issued in this State, i.e. minimum limits, uninsured and underinsured motorist coverage, and statutory "insureds."

In addition, the Financial Responsibility Act, now codified in Chapter 9 of Title 56, requires certain drivers to maintain security as proof of financial responsibility. Proof of financial responsibility includes "motor vehicle liability policies" [certified "SR-22 type" policies] with special conditions, including the conditions of Subsection 20(7)(b)(3). Those special conditions of Subsection 20(7)(b) only apply to the certified policies.

The Pennsylvania National Policy issued to Weaver is not a certified policy. The Policy is a standard automobile policy to which Subsection 20(7)(b)(3) does not apply. Therefore, the notification and cooperation provisions are valid and the insured's breach of the provisions bars recovery by Plaintiff. Thus, the Trial Court erred in granting judgment in favor of Plaintiff against Pennsylvania National because there is no coverage under the Policy issued to Mitchell Weaver.

ARGUMENT

AN AUTOMOBILE LIABILITY INSURER IS NOT ABSOLUTELY OBLIGATED TO PAY A DEFAULT JUDGMENT ENTERED AGAINST ITS INSURED IN FAVOR OF A THIRD PARTY WHEN THE INSURED NEVER NOTIFIED THE INSURER OF THE LAWSUIT NOR FORWARDED ANY OF THE LEGAL PAPERS AS EXPRESSLY REQUIRED UNDER THE TERMS OF THE POLICY BECAUSE SECTION 56-9-20(7)(b)(3) WHICH PROVIDES THAT "NO VIOLATION OF THE POLICY SHALL DEFEAT OR VOID THE POLICY" ONLY APPLIES TO THE SPECIAL CERTIFIED "SR-22 TYPE" POLICIES REQUIRED OF CERTAIN HIGH-RISK DRIVERS AS PROOF OF FINANCIAL RESPONSIBILITY UNDER CHAPTER 9 OF TITLE 56.

A. An insured's breach of a policy provision requiring notification and forwarding of suit papers bars a third party from recovering on a policy if the breach has substantially prejudiced the insurance company.

The South Carolina Supreme Court has long held that where a policy requires the insured to forward suit papers and compliance with such provision is a condition precedent to the insurance company's liability on the policy, the insured's breach in such respect will bar recovery under the policy

unless the company waives the breach. Hatchett v. Nationwide Mutual Ins. Co., 244 S.C. 425, 137 S.E.2d 608, 613 (1964); Squires v. National Grange Mutual Ins. Co., 247 S.C. 58, 145 S.E.2d 673, 677 (1965).

To bar the rights of an innocent third party to recover under a policy, the breach must have resulted in substantial prejudice to the insurance company's rights. Squires, 145 S.E.2d at 677; Factory Mutual Liability Ins. Co. v. Kennedy, 256 S.C. 376, 182 S.E.2d 727, 729-30 (1971). Substantial prejudice is established by entry of a default judgment against the insured. Merit Ins. Co. v. Koza, 274 S.C. 362, 264 S.E.2d 146 (1980).

The Pennsylvania National Policy clearly provides that: "A person seeking any coverage must ... promptly send us copies of any notices or legal papers received in connection with the accident or loss." [R. 42; Policy, Part E - Duties After an Accident or Loss, Page 8 of 10.] The Policy also provides that: "no legal action may be brought against us until there has been full compliance with all the terms of this policy." [R. 43; Policy, Part F - General Provisions, Page 9 of 10.]

There is no dispute that Weaver failed to forward the summons and complaint or any of the other suit papers. Nor is there any dispute that Pennsylvania National has been substantially prejudiced by such breach as clearly established by the entry of a default judgment.

In footnote 11 of the Order, the Trial Court erred in proposing that Defendant had not been "irreparably prejudiced" because any prejudice could

be cured by reopening the underlying tort action for disposition. First, more than one year has passed since entry of judgment and there are no legal grounds for reopening the underlying tort action. Excusable neglect and meritorious defense are not present.

Second, the Court applied the wrong standard of prejudice. A defendant insurer does not have to establish "irreparable prejudice." The Supreme Court has held that an insurer is required to establish "substantial prejudice." Factory Mutual Liability Ins. Co. v. Kennedy, 182 S.E.2d at 727.

Third, the Court has held that a default judgment is proof of substantial prejudice as a matter of law. Merit Ins. Co. v. Koza, supra. The Court specifically held in Koza that it does not matter whether the insurer had notice of the suit if the papers were not forwarded.

Finally, the default judgment cannot be reopened at this late date. There are no grounds to reopen the judgment. Liability was determined by default. Damages were determined upon notice and hearing. Also, the statute of limitations has run and the insurer has destroyed its files.

Notwithstanding whether there was a breach or substantial prejudice to the insurer from that breach, the Trial Court held that the Pennsylvania National policy is a compulsory policy under the Financial Responsibility Act, and that Pennsylvania National cannot deny coverage based on Section 56-9-20(7)(b)(3) of that Act which provides that: "No statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy."

Pennsylvania National maintains that Section 56-9-20(7)(b)(3) only applies to a "motor vehicle liability policy" as defined in the Act and the policy issued to Weaver is not such a policy. Therefore, recovery under the Policy can be barred by Weaver's breach.

B. The provisions of Section 56-9-20(7)(b) only apply to "motor vehicle liability policies" required under the Financial Responsibility Act codified in Chapter 9 of Title 56.

The Financial Responsibility Act is found in Chapter 9 of Title 56 of the South Carolina Code, S.C. Code Ann. §§ 56-9-10 et seq. (Law. Co-op. Rev. 1991). This Chapter requires proof of financial responsibility or after suspension of a driver's license[1]. S.C. Code Ann. § 56-9-540.

Section 56-9-540 provides that financial responsibility may be proven by filing a certificate of insurance as provided in Sections 56-9-550 or 56-9-560. Section 56-9-550 provides that proof of financial responsibility may be furnished by filing a written certificate of any insurance carrier that there is in effect a "motor vehicle liability policy."

A "motor vehicle liability policy" required under the Act is a specific type of automobile insurance policy , defined in the Act as:

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[1] Section 56-9-500 provides that whenever a driver's license is suspended or revoked, any registration shall also be suspended in the absence of proof of financial responsibility. The driver's license will not be reinstated without proof of financial responsibility.

> An owner's or an operator's policy of liability insurance that fulfills all the requirements of §§ 38-77-140 through 38-77-230, **certified as provided in § 56-9-550 or 56-9-560 as proof of financial responsibility** and issued, except as otherwise provided in § 56-9-560, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person or persons named therein as insured, and any other person, as insured, using the vehicle described therein with the express or implied permission of the named insured, and subject to the following special conditions.... (Emphasis added.)

One of those conditions is that: "No statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy." S.C. Code Ann. § 56-9-20(7)(b)(3).

The Supreme Court has held in several cases that the compulsory policy provisions of Subsection 20(7)(b) only apply to certified policies. In Southern Farm Bureau Cas. Ins. Co. v. Fulton, 244 S.C. 559, 137 S.E.2d 769, 771 (1964), the Court stated that "the compulsions of our financial responsibility act, do not apply to policies which have not been certified as proof of financial responsibility." Again, in Factory Mutual v. Kennedy, 182 S.E.2d at 729, the Court noted that Section 56-9-20(7)(b) [formerly 1962 Code § 46-702(7)(b)] only applies to certified policies. See also American Liberty Ins. Co. v. DeWitte, 236 F.Supp. 636 (D.S.C. 1964).

The Trial Court held that the Court's opinions in these cases were mooted by the 1974 Reparation Act, currently codified in Chapter 10 of Title 56, which requires that all registered vehicles be insured. In so holding the Court overlooked the fact that the Legislature retained the provisions of Chapter 9 after the codification of the Reparation Act in 1974 and the recodification in 1987, and the fact that the Legislature recognizes a certified "motor vehicle liability policy" under Section 56-9-20(7) as different from an ordinary automobile insurance policy.

C. **The mandatory policy provision of Section 56-9-20(7)(b)(3) does not apply to ordinary automobile liability insurance policies required under the Automobile Reparation Reform Act, codified in Chapter 10 of Title 56.**

The Trial Court refused to recognize that the Financial Responsibility Act and the Reparation Act contain different requirements regarding automobile insurance. The Trial Court also apparently was confused by recodification of the automobile insurance statutes in 1987. Below is a chronological summary of these two Acts and the history of their codification and recodification which shows that the provisions of Subsection 56-9-20(7)(b)(3) do not apply to every automobile liability policy.

Section 56-9-20(7) was originally enacted in the Motor Vehicle Safety Responsibility Act of 1952. Act No. 723, 1952 S.C. Acts 1853. The Motor Vehicle Safety Responsibility Act was codified in the Title 46 of the 1952 and 1962 Codes. S.C. Code Ann. §§46-701 et seq. The Act did not compel all drivers or car owners to obtain liability insurance. The Act only

required certain "high-risk" drivers to show proof of financial responsibility, either a certified motor vehicle liability policy, a bond or a certificate of deposit, after suspension of a driver's license. S.C. Code Ann. §§ 46-722, 46-738, 46-741 (1962).

The Automobile Reparation Reform Act of 1974 was enacted to prohibit operation of uninsured motor vehicles and effectively require all vehicles to be covered with liability insurance. Act No. 1177, 1974 S.C. Acts 2718. Section 8 of Article I of the Act requires every owner of a registered vehicle to maintain "security" on the vehicle. Such "security" can either be an insurance policy with the minimum limits and other provisions required by law or some other form of security as the Highway Commissioner might deem adequate.

The Reparation Act was codified in Chapter 8.3 of Title 46 of the 1962 Code. S.C. Code Ann. §§ 46-750.101 et seq. (1962, as amended). More specifically, the "Insurance Requirements Relating to Motor Vehicle Registration" were codified in Article 4 of Chapter 8.3. S.C. Code Ann. §§ 46-145 et seq. (1962, as amended).

The 1974 Reparation Act also amended the Code to redesignate the Motor Vehicle Safety Responsibility Act as the Motor Vehicle Financial Responsibility Act. 1974 S.C. Acts No. 1177, § 2, 1974 S.C. Acts 2733.

When the Code was republished in 1976, the Financial Responsibility Act was codified in Chapter 9 of Title 56. S.C. Code Ann. § 56-9-10 et seq. (1976 Code). The Reparation Act was codified in Chapter

11 of Title 56. S.C. Code Ann. § 56-11-10 et seq. (1976 Code). However, in 1987 all these provisions were recodified and reorganized. Act No. 155, 1987 S.C. Acts 385.

Currently, Chapter 9 of Title 56 is the "Motor Vehicle Financial Responsibility Act." S.C. Code Ann. § 56-9-10 (Rev. 1991). Chapter 9 deals exclusively with those special requirements for certified policies. The Reparation Act, which effectively requires all registered vehicles to be insured, is currently codified in Chapter 10 of Title 56. S.C. Code Ann. §§ 56-10-10 et seq. (Rev. 1991).

The general requirements regarding minimum limits, uninsured and underinsured motorist coverage, and the like, have been moved to the Insurance Title -- Chapter 77 of Title 38. S.C. Code Ann. §§ 38-77-10 et seq. (Rev. 1991). These provisions are applicable to all automobile insurance policies, both certified policies specially required under the Financial Responsibility Act in Chapter 9 of Title 56 and standard policies generally required under the Reparation Act in Chapter 10 of Title 56.

The Trial Court apparently thinks that the provisions of Subsection 20(7)(b) apply to all automobile insurance policies since portions of general requirements now found in Title 38 were enacted in the Motor Vehicle Safety Responsibility Act and previously codified in the Financial Responsibility Act in Chapter 9 of Title 56. However, review of this history does not support that conclusion.

Subsection 20(7)(b) are a special conditions of a certified policy required under Chapter 9 as proof of

financial responsibility by drivers whose licenses have been suspended. The Reparation Act now in Chapter 10 does not, and has never, required every owner to procure a certified motor vehicle liability policy as defined in Section 56-9-20(7). Despite the fact that the Reparation Act in Chapter 10, requires all vehicle owners to maintain security, Subsection 20(7) still stands apart from that requirement. Certified policies are separate and distinct from those general policies contemplated in Chapter 10 and 11.

While a Chapter 9 certified policy may not be voided for breach of a notice/forwarding provision, nothing in Chapters 10 or 11 places such a special condition on every standard automobile insurance policy issued in this State. The provisions of the Financial Responsibility Act now codified in Chapter 77 of Title 38 apply to all insurance policies, setting minimum limits and mandatory coverages. See S.C. Code Ann. §§ 38-77-140 (Rev. 1991). However, nothing in those sections of Title 38 places any special condition such as in Section 56-9-20(7)(c) on every standard automobile insurance policy. The Trial Court refused to acknowledge the importance of the fact that since the Reparation Act was enacted, the Supreme Court has continued to note the difference between a "voluntary policy" and a certified policy under Section 56-9-20(7)(b). Merit Ins. Co. v. Koza, 274 S.C. 362, 264 S.E.2d 146 (1980). There, the Supreme Court found it important to note that the insurance policy in question was a voluntary automobile liability policy and not controlled by the provisions of Section 56-9-20(7)(b). The Trial Court distinguished the Court's opinion in Merit based on "a complete review of the record should reveal that Koza involved an out-of-state policy covering vehicles in

South Carolina for the Laurens County fair, but this fact does not appear in the Supreme Court's opinion." [R. 3; Order, p. 3 n.8; emphasis in original.] However, the Supreme Court did not find it relevant to its decision to note the fact that the policy was an out-of-state policy. Further, if Plaintiff's contention was correct, then there would be no such thing as a voluntary automobile liability policy and the Court's statement would be meaningless. The Trial Court relied upon the editor's notes following Section 38-77-140 which cross references Section 56-9-20(7) for a definition of "motor vehicle liability policy" and the Court of Appeals' opinions in S.C. Farm Bureau Mutual Ins. Co. v. Mumford, 299 S.C. 14, 382 S.E.2d 11 (Ct. App. 1989); Farmland Mutual Ins. Co. v. Jim Moore Cadillac-Oldsmobile, Inc., 283 S.C. 33, 320 S.E.2d 719 (Ct. App. 1984), and Pennsylvania National Mutual & Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). Neither the editor's cross reference nor the Court of Appeals' opinions in these cases support the Court holding that the mandatory policy provision of Subsection 20(7)(b)(3) apply to all automobile insurance policies.

In Pennsylvania National v. Parker, the Court of Appeals held that a policy provision limiting coverage to owned vehicles not used for business or commercial purposes was void under the Reparation Act, as then codified in Section 56-11-190, 200 (now Section 56-10-10, 20) and the Financial Responsibility Act, then Section 56-9-820 (now Section 38-77-140). The Court found support for its position in the provision of Section 56-9-20(7)(c) which paralleled the provisions of Section 56-9-900 (now Section 38-77-220).

In Farmland Mutual v. Jim Moore-Cadillac-Oldsmobile, the Court of Appeals held that a liability insurer could not exclude coverage for a permissive user on the basis that the user was employed in an automobile business at the time of the accident. The question arose under the Financial Responsibility Act as codified in 1984, before the recodification in 1987. At issue was the requirement of Section 56-9-820, currently Section 38-77-140, which required that all automobile insurance policies cover every "insured" as defined in Section 56-9-810(2), now Section 38-77-30(6). The Court of Appeals had nothing to say about the requirements of Section 56-9-20(7)(b)(3).

In S.C. Farm Bureau Mutual v. Mumford, the Court of Appeals held that an intentional act exclusion in a liability policy was invalid because Section 38-77-140 requires insurers to cover against "loss from liability imposed by law" without distinction as to intentional versus negligent acts. By its own terms, the requirements of Section 38-77-140 apply to all "automobile insurance policies." However, "motor vehicle liability policies" must not only meet the requirements of Title 38, but also the special conditions set forth in Section 56-9-20(7)(b).

The Trial Court's reliance on these cases is not supported upon a careful reading of the Court's opinions in context with the legislative history of the Financial Responsibility Act and the Reparation Act. The Trial Court also misplaced reliance on Ott v. American Fidelity & Casualty Co., 161 S.C. 314, 159 S.E. 635 (1931).

In Ott, the Supreme Court held that an insured's failure to give notice of an accident would

not bar recovery by the injured party because the insurance coverage was mandatory under a specific statute governing "every applicant for a certificate for passenger carrying vehicles." The mandatory policy in Ott is similar to a certified policy under Section 56-9-20(7) in that a policy must be filed with the Public Service Commission. 1925 S.C. Acts 252. Act No. 170, currently, S.C. Code Ann. § 58-23-910; see also PSC Reg. 103-171. Similar to Section 56-9-20(7)(c), PSC Regulation 103-107 provides that "no violation of any of the provisions of the policy or bond or of any endorsement attached thereto, shall relieve the insurance or bonding company from liability under the policy or bond or from the payment of any final judgment recovered against the insured."

In Evans v. American Home Assurance Co., 252 S.C. 417, 166 S.E.2d 811, 812 (1969), the Supreme Court noted the difference between the mandatory coverage involved in Ott and the voluntary coverage under the Financial Responsibility Act:

> As to liability insurance which is required by law, we have held that a breach of policy conditions by the insured after the injury will not bar recovery against the insurer by the victim of the insured's negligence. Ott v. American Fidelity & Cas. Co. .... Our statute so provides as to a certified policy under the Motor Vehicle Responsibility Act, [Section 56-9-20(7)(b)].

166 S.E.2d at 812. However, the same rule does not apply to an ordinary policy.

Other states have held that the special conditions imposed on policies certified as proof of financial responsibility do not apply to all insurance policies issued in the state. Hague v. Liberty Mutual Ins. Co., 571 F.2d 262 (5th Cir. 1978); State Farm Mutual Auto. Ins. Co. v. Mettetal, 534 So.2d 189 (Miss. 1988).

In a situation similar to this case, Liberty Mutual's insured, a taxicab company failed to notify the insurer of an accident. The injured party obtained a default judgment and then brought an action to collect on the policy. The trial court held that the insurer was not liable under the policy because the insured had not met the condition precedent of giving notice of the accident. The judgment creditor contended that Mississippi law prevented the insurer from denying coverage on the basis of the inadequate notice.

The law in question was the virtually identical provision of the Mississippi Safety Responsibility Act, Miss. Code Ann. § 63-15-43(6)(a), providing that "no violation of said policy shall defeat or void said policy." The Court held that "said policy" was a certified insurance policy required as proof of financial responsibility after an owner or operator has had an accident causing personal injury or property damages in excess of a certain amount.

The Court rejected the plaintiff's contention that the special condition be imposed on Liberty Mutual's policy because it was required under a separate statute mandating that taxicabs carry liability insurance. The Court stated that the plaintiff's argument ignored the words in section 63-15-43(6)(a)

which made it applicable only to policies required under the responsibility act and also ignored the separate codification of the provisions.

The Trial Court's reasoning similarly ignores the express language of Subsection 20(7) and the statutory organization of the Financial Responsibility Act and the Reparation Act. The Pennsylvania National Policy is not a policy required under Chapter 9. The fact that the policy was required under Chapter 10 does not mean that the special condition of Subsection 20(7)(b)(3) applies. By its express terms, that special condition only applies to certified policies and the Trial Court erred in applying the special condition to Pennsylvania National's Policy.

D. The Legislature did not intend to subject insurers to absolute liability on all automobile insurance policies for default judgment entered against their insureds when the insured breaches his contractual obligation to notify the insurer of pending litigation and forward suit papers.

The Supreme Court has already acknowledged that in enacting the Financial Responsibility Act the General Assembly did not intend to hold insurers liable without notice or opportunity to contest a claim on its policy. Hatchett v. Nationwide Mutual Ins. Co., 244 S.C. 425, 137 S.E.2d 608 (1964). There, the Court held that Nationwide could deny recovery under a "mandatory" uninsured endorsement in a policy based on the insured's failure to give written notice of the accident as soon as practicable. The Court held that the policy provision requiring notice did not conflict with the terms of the Act and were valid, stating:

> Although the Act [§46-750.18] contains the phrase "nor may anything be required of the insured except the establishment of legal liability," the legislature never intended by this language to hold an insurance company liable without notice or opportunity to investigate or contest the claim.

Id. at 612.

The Legislature never intended an insurance company to be absolutely liable on every automobile policy it issues for default judgments rendered against its insureds, when the insurance company never receives the suit papers. With certified policies, the insurance company may be so absolutely liable, but such a special policy is not required on every automobile owner. A certified policy is only required of certain high risk operators/owners, and those insureds pay a higher premium for such absolute liability.

Further, any such attempt by the Legislature to impose absolute liability on an insurer regardless of the terms of a contract voluntarily entered into with the insured would present serious due process and contract clause problems. If Plaintiff's contentions were correct, then an Insurance Company could be forced to pay without ever having had notice and an opportunity to be heard -- basic due process rights. However, such problems need not arise here because neither the statute nor the case law support Plaintiff's contention that the provisions of this Policy are unenforceable. We ver breached the Policy by failing to notify Pennsylvania National of the suit or forward

the papers. Therefore, recovery on the Policy is barred.

CONCLUSION

The Pennsylvania National Policy was not a certified "motor vehicle liability policy." Therefore, the special condition of Section 56-9-20(7)(b)(3) that "no violation of the policy shall defeat or void the policy" does not limit Pennsylvania National's right to condition its liability on the insured's compliance with his contractual obligation to notify the Insurer of pending litigation and to forward suit papers.

Weaver did not notify the Insurer of Johnson's lawsuit or forward the summons and complaint as required by the conditions of the Policy. As a result of his breach, Pennsylvania National was substantially prejudiced by virtue of the entry of a default judgment. Therefore, Johnson is barred from recovering under the Policy.

Based on the foregoing, Pennsylvania National respectfully submits that the Trial Court erred in granting judgment in favor of Johnson against Pennsylvania National. The judgment should be reversed and judgment entered for Pennsylvania National.

Respectfully submitted,

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August 3, 1992

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

A. Victor Rawl, Circuit Court Judge
Civil Action No. 90-CP-21-1597

Opinion No. 2055, Filed July 19, 1993

Linda Johnson Shores, Personal Representative of the Estate of Kenneth Johnson, **RESPONDENT,**

versus

Mitchell L. Weaver and Pennsylvania National Mutual Casualty Insurance Company, Defendants,

OF WHOM

Pennsylvania National Mutual Casualty Insurance Company is **APPELLANT.**

PETITION FOR REHEARING

The Defendant-Appellant respectfully petitions for a rehearing and submits the following points which it believes were overlooked or misapprehended by the Court:

1. The Court misapprehended the South Carolina Automobile Reparation Reform Act because the Act does not mandate an insurance policy for every registered vehicle but instead only mandates "security" which may consist of an insurance policy or other approved and accepted security in lieu of liability insurance.

2. The Court misapprehended the authority of the statutory language of § 56-9-10 et seq. including particularly the § 56-9-20(7)(b) because the statutory provisions apply only to certified policies of insurance issued to drivers who have once violated the financial responsibility mandates of South Carolina law.

3. The Court misapprehended the authority of Factory Mutual Liability Insurance Co. v. Kennedy, 256 S.C. 376, 182 S.E.2d 727 (1971) because the case holds that the provisions of § 56-9-20(7)(b) apply only to certified policies.

4. The Court misapprehended the authority of Merit Insurance Co. v. Koza, 274 S.C. 362, 64 S.E.2d 146 (1980) because the case holds that the provisions of § 56-9-20-(7)(b) apply only to certified policies.

5. The Court misapprehended the authority of Evans v. American Home Assurance Co., 252 S.C. 417, 166 S.E.2d 811 (1969) because the case stands for the principal that § 56-9-20(7)(b) applies only to certified policies.

6. The Court misapprehended the authority of Hatchet v. Nationwide Mutual Insurance Co., 244 S.C. 425, 137 S.E.2d 608 (1964) which holds that policy provisions requiring notice to the insurer are not in conflict with the act.

7. The Court misapprehended or overlooked the constitutional due process right of Pennsylvania National Mutual Insurance Co. to notice and an opportunity to be heard before being deprived of its property.

8. The Court misapprehended or overlooked the constitutional due process right of Pennsylvania National Mutual Insurance Co. not to be bound by the amount of a judgment or the determination of liability without notice and an opportunity to be heard.

9. The Court overlooked or misapprehended the common law contract principals of enforcing the terms of a contract in which parties are free to contract for.

10. The Court misapprehended or overlooked the distinction between noncertified policies for registered automobiles and certified policies for drivers who violate certain provisions of law.

11. The Court overlooked or misapprehended the public policy of South Carolina which does not encourage evasive conduct of suing in a court of law with no notice to the party the plaintiff seeks to recover from.

12. The Court overlooked or misapprehended the public policy of South Carolina which does not encourage collusion, collaboration, neglect, or

acquiescence between injured parties and alleged tort feasors to the detriment of an insurer who has no notice.

13. The Court misapprehended or overlooked the public policy of South Carolina or the common law of South Carolina which does not provide for a payment to an injured party when there is no at-fault tort feasor.

14. The Court overlooked or misapprehended the public policy of South Carolina which explicitly encourages a reduction of cost of insurance.

15. The Court overlooked or misapprehended the public policy of South Carolina which supports the right of a litigant to a jury trial.

16. The Court overlooked or misapprehended the public policy of South Carolina which does not support an increase in premiums for those who cooperate with insurers when caused by those who do not cooperate and by injured parties who give no notice.

17. The Court misapprehended or overlooked the public policy of South Carolina which encourages the balance of an adversarial system to arrive at the truth of facts which establish legal liability.

18. The Court overlooked or misapprehended the public policy of South Carolina which upholds the mutuality of contract promises.

19. The Court overlooked the potential impact of holding that a standard automobile insurance policy is mandatory because the case of Davenport v. Summer, 269 S.C. 382, 259 S.E.2d 815 (1979) holds "that a policy of insurance is not an absolute requirement but that

other forms . . . of security in lieu of such a habitat insurance policy . . . are permitted" so that the plaintiff in Davenport v. Summer was not allowed to bring a direct action against the insurance company.

20. The Court misapprehended or overlooked the impact of the opinion on the portion of liability insurance limits which exceed the security requirements of the South Carolina Automobile Reparation Reform Act of 1974.

The Petitioner requests that the Court grant a rehearing and reverse the trial court.

Respectfully submitted,

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August 3, 1993.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

A. Victor Rawl, Circuit Court Judge
Civil Action No. 90-CP-21-1597

Opinion No. 2055, Filed July 19, 1993

Linda Johnson Shores, Personal Representative of the Estate of Kenneth Johnson, **RESPONDENT,**

versus

Mitchell L. Weaver and Pennsylvania National Mutual Casualty Insurance Company, Defendants,

OF WHOM

Pennsylvania National Mutual Casualty Insurance Company is **APPELLANT.**

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The citation of authority for the points raised in the Petition for Rehearing are included in the Petition for Rehearing and are identified with the issues which are separately raised.

The Petitioner is relying on the South Carolina Automobile Reparation Reform Act, the Motor Vehicle Safety Responsibility Act, and more particularly the following: Act No. 170, 1925 S.C. Acts 252; Act No. 723, 1952 S.C. Acts 1853; Act No. 1177, 1974 S.C. Acts 2718; Act No. 155, 1987 S.C. Acts 385; S.C. Code Ann. (1962) §§46-701 et seq.; § 46-702(7)(b); § 46-722; § 46-738; § 46-741; §§ 46-750.101 et seq.; §§ 46-750.145 et seq.; S.C. Code Ann. (1976) § 56-11-10 et seq.; S.C. Code Ann. (Rev. 1991) §§ 38-77-10 et seq.; §§ 38-77-140; §§ 56-9-10 et seq.; § 56-9-20(7)(b)(3); § 56-9-500; § 56-9-540; § 56-9-550; § 56-9-560; §§ 56-10-10 et seq.; and § 58-23-910.

Petitioner also relies on the cases cited in the Petition for the points raised in the Petition based on the following cases: Factory Mutual Liability Insurance Co. v. Kennedy, 256 S.C. 376, 182 S.E.2d 727 (1971); Merit Insurance Co. v. Koza, 274 S.C. 362, 64 S.E.2d 146 (1980); Evans v. American Home Assurance Co., 252 S.C. 417, 166 S.E.2d 811 (1969); Hatchet v. Nationwide Mutual Insurance Co., 244 S.C. 425, 137 S.E.2d 608 (1964); and Davenport v. Summer, 269 S.C. 382, 259 S.E.2d 815 (1979).

Respectfully submitted,

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August 3, 1993.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

A. Victor Rawl, Circuit Court Judge
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Opinion No. 2055 (S.C. Ct. App. filed July 19, 1993)

Linda Johnson Shores,
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Insurance Company **PETITIONER.**

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that a Petition for Rehearing was made and finally ruled upon by the Court of Appeals.

QUESTIONS PRESENTED FOR REVIEW

I. **DOES AN AUTOMOBILE LIABILITY INSURER HAVE TO PAY A DEFAULT JUDGMENT ENTERED AGAINST ITS INSURED IN FAVOR OF A THIRD PARTY WHEN NEITHER THE INSURED NOR THE THIRD PARTY NOTIFIED THE INSURER OF THE LAWSUIT NOR FORWARDED ANY OF THE SUIT PAPERS AS REQUIRED UNDER THE TERMS OF THE POLICY?**

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WITH ANY STATUTORY PROVISIONS FOR STANDARD POLICIES?

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VI. IS IT THE PUBLIC POLICY OF SOUTH CAROLINA TO VOID THE RIGHT OF THE INSURER TO RECEIVE SUIT PAPERS?

STATEMENT OF THE CASE

This is a declaratory judgment action to determine insurance coverage for an automobile accident. The insurer, Pennsylvania National, defended on the grounds that the insured failed to notify the insurer of the civil action or to forward suit papers.

The Plaintiff, Johnson, was injured in an accident on August 13, 1983, while riding in the bed of a pickup truck driven by Weaver. Pennsylvania National insured the truck under a standard policy that requires the insured to promptly forward any legal papers. Pennsylvania National was notified of the accident on August 17, 1983, and assigned the loss to Crawford & Company for adjusting. Shortly after this, on October 31, 1983, Plaintiff's attorney first notified Crawford & Company that he represented the Plaintiff. He wrote several letters, the last of which, dated February 14, 1984, demanded payment of the limits or advised that suit would be brought within ten days. That was the last that Crawford or Pennsylvania National heard from the Plaintiff until this declaratory judgment action was served upon Pennsylvania National over six years later in December, 1990.

While the Plaintiff had threatened to bring the tort suit in February, 1984, the tort suit was not served against Weaver until over two years later on May 7, 1986. Pennsylvania National was not provided with any copy of the suit papers by the Plaintiff or Weaver, the insured, and neither gave any notice to Pennsylvania National of the suit. Plaintiff's counsel did not send copies of the suit papers to either Crawford & Company or Pennsylvania National.

Weaver failed to answer and a default judgment was entered by Judge C. Anthony Harris which was filed on January 12, 1987. Interestingly enough, but now moot, is the fact that the default judgment was entered on the basis of a "fraud and deceit" action. [R.p. 57.]

Over a year later, a damages hearing was held on December 17, 1987. On January 21, 1988, an Order was entered awarding the Plaintiff $250,000.00.

Pennsylvania National was not given notice of the entry of default or the damages hearing or the judgment. After six years had elapsed since the accident and having never been notified of any suit, Pennsylvania National and Crawford & Company destroyed their files in the matter since the statute of limitations had run. [R.pp. 27, 55.]

This declaratory judgment action was instituted on December 14, 1990. The Plaintiff contended that the statutory provisions which were enacted for certified policies under Section 56-9-20(7)(b)(3) which provide that "no violation of the policy shall defeat or void the policy" should be interpreted as having been adopted under the 1974 Reparation Act to apply to all standard liability insurance policies. Cross motions for summary judgment were made. The Trial Court adopted the Plaintiff's interpretation and wrote into the Reparations Act a prohibition against policy provisions requiring the insured to cooperate and forward suit papers.

The Court of Appeals declined to consider the statutory interpretation question and, instead, announced a "public policy" that the insured is not entitled to know about the lawsuit or have the suit papers as a condition of the insurance policy.

This is a significant case that affects every standard automobile insurance policy issued in South Carolina. The decision of the Court of Appeals is a novel case which is inconsistent with a well-settled body of law in South Carolina upholding the validity of this common policy provision requiring the insured to give notice of a lawsuit and forward suit papers. This decision is significant not only because it is novel, but also because it is contrary to well established case law and contrary to significant contract rights and constitutional due process rights of an insurer. This case is also of importance because the opinion of the Court of Appeals in looking to "public policy" failed to consider a number of other important policy factors that are found in both the statutory and common law of South Carolina.

For these reasons, Pennsylvania National respectfully requests that the Supreme Court accept jurisdiction of this case and issue a writ of certiorari to review the decision of the Court of Appeals.

ARGUMENT

I. DOES AN AUTOMOBILE LIABILITY INSURER HAVE TO PAY A DEFAULT JUDGMENT ENTERED AGAINST ITS INSURED IN FAVOR OF A THIRD PARTY WHEN NEITHER THE INSURED NOR THE THIRD PARTY NOTIFIED THE INSURER OF THE LAWSUIT NOR FORWARDED ANY OF THE SUIT PAPERS AS REQUIRED UNDER THE TERMS OF THE POLICY?

Section 56-9-20(7)(b)(3) which provides that "no violation of the policy shall defeat or void the policy" applies only to certified policies issued to certain high risk drivers as proof of financial responsibility and does not apply to "noncertified" or "standard" policies issued for all registered vehicles.

The Trial Court held that the Pennsylvania National policy may not be voided by Weaver's breach of contract. The Trial Court mistakenly relied upon S.C. Code Ann. § 56-9-20(7)(b)(3) which provides that "certified" policies or "SR-22 type" policies may not be voided by the insured's breach of the policy conditions. The Trial Court took these provisions which apply only to "certified" policies and applied them to all automobile liability policies on the theory that the Reparation Reform Act of 1974 compels liability insurance or other financial security for all registered automobiles. This is error because the policy issued to Weaver is not a certified policy subject to the provisions of Section 20(7)(b)(3). This is not a prohibition which was incorporated into the Reparation Reform Act and it does not apply to standard policies.

Because of the happenstance that prior to the Reparation Reform Act "certified" policies were mandatory under certain circumstances and "standard" policies were "voluntary" as an option to an uninsured motorist fee, the phrases "mandatory" and "voluntary" have sometimes been used to describe the distinction between "certified" policies and "standard" policies. The terms "certified" and "standard" give better descriptions, but the use of the word "voluntary" to describe a "standard" policy is still appropriate. As the Supreme Court recognized in Davenport v. Summer, 273 S.C. 771; 259 S.E.2d 815 (1979), South Carolina law does not have

an absolute requirement for liability insurance but, instead, has a requirement for financial security. The security mandated to register motor vehicles under the Reparation Reform Act may be accomplished with either liability insurance or through another approved form of security.

S.C. Code Ann. § 56-11-200. "Form of Security; Amount Required." provides:

> The security required under this chapter shall be a policy or policies written by insurers authorized to write such policies in South Carolina providing for at least (1) the minimum coverage as specified in Article 7 of Chapter 9 and (2) the benefits required under §§§ 56-11-110, 56-11-120 and 56-11-150; provided, however, that the Chief Highway Commissioner may approve and accept another form of security in lieu of such a liability insurance policy if he finds that such other form of security is adequate to provide and does in fact provide the benefits required by this chapter.

As the Supreme Court recognized in Davenport v. Summer: "It will be observed that a policy of insurance is not an absolute requirement but that other forms . . . of security in lieu of such a liability insurance policy . . . are permitted." 259 S.E.2d at 817.

In Davenport v. Summer, the plaintiff sought to join the liability carrier as a defendant in a motor vehicle collision case. The plaintiff contended that the adoption of the Reparation Reform Act of 1974

permitted the joinder of the liability carrier because the insurance was "mandatory". The trial court agreed with this but the Supreme Court found it to be error and reversed saying:

> There is nothing in the act which evidences an intent on the part of the legislature to change the well established law that in the ordinary motor vehicle collision case the insurance carrier of the Defendant may not be joined.

Id. at 816.

In the present case, the Plaintiff likewise contends that because the Reparation Reform Act is "mandatory" that the long-recognized valid policy provisions requiring the insured to forward suit papers are void and may no longer be in a standard insurance policy. The decision of the Courts below is in error as it was in Davenport v. Summer.

There is nothing in the Reparation Reform Act which evidences an intent on the part of the legislature to change the well established law that in a standard automobile liability policy the insurer may require the insured to give notice of a lawsuit and forward suit papers.

II. SECTION 56-9-20(7)(B)(3) WHICH PROVIDES THAT "NO VIOLATION OF THE POLICY SHALL DEFEAT OR VOID THE POLICY" APPLIES ONLY TO CERTIFIED POLICIES ISSUED TO CERTAIN HIGH RISK DRIVERS AS PROOF UNDER THE FINANCIAL

RESPONSIBILITY ACT AND DOES NOT APPLY TO "NONCERTIFIED" OR "STANDARD" POLICIES ISSUED FOR ALL REGISTERED VEHICLES UNDER THE AUTOMOBILE REPARATION REFORM ACT.

The difference between "certified" policies and "standard" policies arises from the separate and distinct statutory sources of these two kinds of policies.

South Carolina Motor Vehicle Financial Responsibility Act
(S.C. Code Ann. §§ 56-9-10 et seq.)

This is the long established South Carolina statute which requires certain drivers to obtain a certified policy in order to retain a driver's license. Article Four is entitled "Security Following Motor Vehicle Accidents" and this language conveys a statutory scheme which comes into effect after an automobile accident for certain drivers. Section 56-9-350 provides in part:

> The operator or owner of a motor vehicle involved in an accident resulting in property damage of $400,000 or more, or in bodily injury or death, must be furnished a written request form at the time of the accident, or as soon after the accident as possible, by the investigating officer for completion and verification of liability insurance coverage, the form to be in a manner prescribed by the department.

If the person involved in the accident has not complied with the law then certain sanctions are

imposed. Section 56-9-351 requires the Department to suspend the license of such a driver. Section 56-9-355 provides that the driver may not obtain a license or registration without compliance with the Article.

When the provisions of this Act are triggered, Section 56-9-540 specifies the required proof of financial responsibility as follows:

> § 56-9-540. Methods of proving financial responsibility.
>
> Proof of financial responsibility when required under this chapter may be given by filing:
>
> (1) A certificate of insurance as provided in § 56-9-550 or § 56-9-560;
>
> . . .

Section 56-9-550 then sets out a special type of "certified" policy which such a person must furnish to the Department and have certified by their insurance carrier. This particular kind of "certified" policy is defined in Section 56-9-20(7) and it is subsection (B)(3) which states that "no violation of the policy shall defeat or void the policy".

South Carolina Automobile Reparation Reform Act
(S.C. Code Ann. § 56-10-10 et seq.)

This case does not present a "certified" policy defined under Section 56-9-20(7) of the Motor Vehicle Financial Responsibility Act. Instead, this case presents a "standard" policy whose use was vastly expanded under the Automobile Reparation Reform Act of 1974. These

provisions appear under an entirely different chapter, specifically Chapter Ten entitled "Motor Vehicle Registration and Financial Security". This chapter sets out a requirement of a standard policy or other financial security in order to register a motor vehicle. The requirements of security for the general motoring public are set out in Section 56-10-10 which provides:

> Every owner of a motor vehicle required to be registered in this state shall maintain the security required by § 56-10-20 with respect to each such motor vehicle owned by him throughout the period the registration is in effect. . .

The type of security then established under Section 56-10-20 is established as:

> The security required under this chapter is a policy or policies written by insurers authorized to write such policies in South Carolina providing for a least (1) the minimum coverage is specified in §§ 38-77-140 through 38-77-230 and (2) the benefits required under §§ 38-77-240, 38-77-250, and 38-77-260. However, the executive director of the Department of Highways and Public Transportation may approve and accept another form of security in lieu of such liability policy . . .

The security required under Chapter Ten in order to register a motor vehicle refers only to the minimum coverages mandated under the insurance code. No references are made of any kind to the special policies which are defined under the Financial Responsibility Act

for drivers who have already been in an accident and have violated law.

The distinct legislative attempts to deal with the general motoring public on the one hand and that small subset who violate the law on the other hand is clear. There is no evidence of any attempt to take the special requirements imposed on an insurer issuing a "certified" policy under the strictures of the Financial Responsibility Act and impose it on the broad general provisions of the Reparations Reform Act.

In recognizing the difference between a "certified" policy and a "standard" policy (which was then also more fully voluntary), the Supreme Court has said:

> It is settled law with us that a liability insurer may successfully defend upon the ground that the insured has violated the cooperation clause of the policy . . . Meehan v. Commercial Cas. Ins. Co., 166 S.C. 496, 165 S.E. 194 (1932); Pennsylvania Threshermen & F.M. Cas. Ins. Co. v. Owens, 238 F.2d 549 (4th Cir. 1956); Pharr v. Canal Ins. Co., 233 S.C. 266, 104 S.E.2d 394 (1958); Crook v. State Farm Mut. Ins. Co., 235 S.C. 452, 112 S.E.2d 241 (1960).

Evans v. American Home Assurance Company, 252 S.C. 417, 166 S.E.2d 811, 813 (1969). After the adoption of the Reparation Reform Act, the Supreme Court has again reiterated the validity of policy provisions which impose a duty to cooperate on the insured. In Merit Insurance Co. v. Koza, 274 S.C. 362, 264 S.E.2d 146 (1980) the Supreme Court held that the policy provisions were a valid defense against an action brought by an

injured third party if the insurer was substantially prejudiced by the insured's noncompliance.

In reaching this result, the Court said:

> It is important to note that the insurance policy in question is a 'voluntary' automobile liability policy and, therefore, not controlled provisions of § 56-9-20(7)(b), S.C. Code of Laws (1976). See Factory Liability Insurance Co. v. Kennedy, 256 S.C. 376, 182 S.E.2d 727 (1971); Evans v. American Home Assurance Company, 252 S.C. 417, 166 S.E.2d 811 (1969). As such, Merit has the benefit of asserting the insured's failure to comply with the policy provisions as a defense against actions brought by injured third parties if it has been substantially prejudiced by the insured's noncompliance. Factory Mutual Liability Insurance Co., supra.
>
> Here, prejudice is clearly established by the fact that a default judgment was entered against the insured.

Id. at 147.

The Court of Appeals has referred to the transcript of record from Merit Insurance Co. v. Koza and found that it construed a policy which covered a vehicle registered in Florida. The Supreme Court did not find it significant to its decision to note the fact that the policy was an out-of-state policy. It is simply a standard automobile insurance policy "not controlled by the provisions of Section 56-9-20(7)(b)." Whether a

"standard" policy is issued as a "voluntary" policy on a Florida registered vehicle or whether a "standard" policy is issued as a voluntary choice under the South Carolina financial security mandates of the Reparation Reform Act, should make no difference and the Court noted no difference. Under either case, such policies are not controlled by the provisions of Section 56-9-20(7)(b) which apply only to "certified" policies issued to those drivers who have already once violated the law.

The enactment of the Reparation Reform Act did not intend to change the well established law of South Carolina which gives an insurer the benefit of asserting the insured's failure to comply with policy provisions if it has been substantially prejudiced. The decision of the Court of Appeals should be reversed and judgment entered for Pennsylvania National.

III. THE POLICY PROVISIONS REQUIRING THE INSURED TO FORWARD SUIT PAPERS ARE NOT IN CONFLICT WITH ANY STATUTORY PROVISIONS FOR STANDARD POLICIES.

There are historical and substantive reasons for the distinction between "certified" policies and "standard" policies. Both before and after the Reparation Reform Act, South Carolina law has provided for some form of financial security. For drivers who have violated South Carolina law, the additional requirements of "certified" policy are imposed on that person. These are requirements over and above those which apply to the general public and the special limitations on these policies should still apply only to these policies.

Standard policies are issued to owners to register vehicles. Certified policies are issued to certain operators in order to get a driver's license. Someone who wishes to drive in South Carolina but does not own an automobile may get a driver's license without having liability insurance. On the other hand, someone who has violated the law and does not own an automobile may not get a driver's license without first obtaining a certified policy which complies with the special provisions of the Code for such drivers.

With a standard policy, an owner who wants to register a car makes their own certification to the Highway Department. On the other hand, for someone who has violated the law, the insurance company itself must certify to the Highway Department.

Under a standard policy, the insurer may cancel by normal means with notice to the insured. Under a certified policy, the insurer must give notice of cancellation to the Highway Department and wait for the statutory specified time before canceling the policy.

Standard policies are issued on registered automobiles. Certified policies are issued to certain licensed drivers. Standard policies are issued to a standard risk population. Certified policies are issued to a high risk population -- high risk in terms of financial security as well as driving conduct.

Misrepresentations and failure to cooperate can void a standard policy. No statement of an insured and no violation of a policy provision can void a certified policy.

These differences in the two kinds of insurance policies have been recognized by the enactments of the legislature and the decisions of the Supreme Court.

These two different kinds of policies should be recognized in this case and the decision of the Court of Appeals should be reversed.

IV. THE RIGHT OF THE INSURER TO NOTICE AND FORWARDING OF SUIT PAPERS IS BALANCED BY THE NEED TO SHOW PREJUDICE.

In any balancing of rights, both the rights of the injured party and the rights of the insurer can be acknowledged. The Court has not given efficacy to technical violations of the terms of a policy but has required a showing of prejudice. The Court has sought to prevent to the insurer's right to conduct a reasonable investigation of the accident and adequately defend an action on the one hand against some technical deprivation of the rights of a third party on the other hand.

This conclusion was stated in Factory Mutual Liability Insurance Co. of America v. Kennedy, 256 S.C. 376, 182 S.E.2d 727, 729 (1971), where the Court stated:

> The obvious function of the policy provisions, requiring the insured to give notice of the accident and forward suit papers, is to prevent prejudice to the insurer's right to conduct a reasonable investigation of the accident and adequately defend any action brought against the insured. If such prejudice does not result

> to the rights of the insurer, no sound reason appears to permit a mere technical noncompliance to deprive an innocent third party of benefits to which he would otherwise be entitled. The requirement that noncompliance must result in prejudice to the rights of the insurer preserves the basic function of the notice conditions and at the same time prohibits a technical application thereof from defeating the public purpose of affording protection to the innocent victim of a motor vehicle accident.

Just as the Court should not let an insurer avoid its obligations because of a technical noncompliance, the Court should not allow an injured party to play hide and seek with the policy benefits. There should be an encouragement that the rights of the parties be decided on the merits.

Here, the Plaintiff could have easily avoided prejudice by sending a copy of the suit papers to the insurer. While the insured may have been in technical noncompliance, the insurer would not have been able to claim prejudice because the insurer would have had actual notice.

The Plaintiff knows who the insurer is and where the insurer is. The Plaintiff knows where he wants his check and the Plaintiff knows where to serve his declaratory judgment action. Pennsylvania National is simply asking that it be sent a copy of the Summons and Complaint and given a chance to defend the action which was brought.

This can easily be done in the same way it is often done in uninsured motorist cases. The uninsured Defendant may not answer the lawsuit. However, the injured party is then required to send the suit papers to the uninsured motorist carrier so that it can have notice, an opportunity to be heard and defend. Our Courts have held that an insurer cannot rely on or insist upon technical services of a Summons and Complaint but if the injured party sends a copy and gives actual notice, there is no prejudice.

In this case, it was within the control of the injured party to eliminate any prejudice and eliminate any loss of benefits to himself by simply giving Pennsylvania National the suit papers that the insured failed to give. This is a frequently employed practice within the South Carolina Bar by those representing injured parties who want to be sure that the coverage is not voided and the insurer is not prejudiced by a failure of the insured to forward suit papers.

The Trial Court in this case recognized this prejudice but passed over it commenting that the prejudice could be eliminated by reopening the underlying tort action. [R.p. 5 (footnote)] This was an error of law. There is no legal basis for reopening the underlying judgment in this case.

It was the Plaintiff's choice to bring an action without notice to the insurer; to obtain a default; to obtain a default in a "fraud and deceit" action; [R.p. 59] to obtain a damages judgment against a Defendant who was brought from jail; [R.p. 61] to wait until after the statute of limitations had run and Pennsylvania National had destroyed the file before giving any notice. Then,

after it would be impossible for Pennsylvania National to do anything, a declaratory judgment action is brought.

The Plaintiff did not have to do this but could have given notice and an opportunity to defend retaining all the Plaintiff's rights to seek benefits under the policy.

V. THE CONTRACT TERMS OF A STANDARD AUTOMOBILE POLICY REQUIRING THE FORWARDING OF SUIT PAPERS SHOULD BE ENFORCED AS TO LIABILITY COVERAGE JUST AS THEY ARE AS TO UNINSURED MOTORIST COVERAGE AND OTHER LIABILITY POLICIES IN SOUTH CAROLINA.

The duty of an insured to cooperate and forward suit papers is a standard contract provision in policies of liability insurance and should be enforced by the Courts. A number of South Carolina cases which have recognized and given validity to these policy provisions in a standard automobile policy are Meehan v. Commercial Cas. Ins. Co., 166 S.C. 496, 165 S.E. 194 (1932); Pennsylvania Threshermen & F.M. Cas. Ins. Co. v. Owens, 238 F.2d 549 (4th Cir. 1956); Pharr v. Canal Ins. Co., 233 S.C. 266, 104 S.E.2d 394 (1958); Crook v. State Farm Mut. Ins. Co., 235 S.C. 452, 112 S.E.2d 241 (1960); and Evans v. American Home Assurance Company, 252 S.C. 417, 166 S.E.2d 811, 813 (1969).

The Supreme Court has also had occasion to consider the validity of the duty to cooperate clause in the context of uninsured motorist coverage. In Hatchett v. Nationwide Mutual Insurance Co., 244 S.C. 425, 137 S.E.2d 608 (1964), the Plaintiff instituted an action against an uninsured motorist who failed to answer and

went into default. The Plaintiff notified the uninsured motorist carrier of the default but refused to waive the default and permit an answer to be filed on behalf of the uninsured motorist. The policy provided as a condition that a copy of the Summons and Complaint be forwarded immediately to the company.

The Plaintiff took the position that § 46-750.18 of the Code of Laws of South Carolina, 1962 which states: ". . . nor may anything be required of the insured except the establishment of legal liability, . . ." operated to void any policy requirement for giving notice. The Plaintiff contended that the only thing he needed to establish was the legal liability of the uninsured motorist and that since the provisions of Section 46-750.14 were mandatory that the policy provision did not comply with the Act. The Trial Court agreed but the Supreme Court reversed. In reaching this result, the Court said at page 612:

> Although the Act contains the phrase 'nor may anything be required of the insured except the establishment of legal liability,' the legislature never intended by this language to hold an insurance company liable without notice or opportunity to investigate or contest the claim.

As in the present case where the Plaintiff never gave the insurer an opportunity to answer and defend, in Hatchett, the Plaintiff refused to waive the default and permit an answer to be filed in the tort action. The Court held that this violation of the policy terms and cutting-off of the right of the insurer to notice and an opportunity to defend required judgment to be entered in favor of the insurer.

In the present case, the Plaintiff seeks to rest his position on the rights he has acquired through default which operated to the prejudice of Pennsylvania National. Pennsylvania National has been deprived of the opportunity to sponsor a defense of its insured. The right to defend its own insured should be an even greater right than that of an uninsured motorist carrier to defend an uninsured motorist with whom it has no contractual obligation or duty.

In Hatchett, the Supreme Court granted this right to the uninsured motorist carrier to be sent suit papers and have the opportunity to defend and said at page 613:

> [The Plaintiff] chose to rest his position upon the rights he had acquired through default which operated to the prejudice of the insurance company. It was in large measure deprived of the opportunity, which compliance by Plaintiff would have afforded, to investigate promptly, to negotiate a settlement without the handicap of a default position, or to sponsor the defense of the uninsured motorist, thereby insuring that the amount which Plaintiff 'shall be legally entitled to recover' be fairly established.

If the right to the policy provision imposing a duty to cooperate and send suit papers is valid as to the "mandatory" uninsured motorist coverage it should also be valid as to the "mandatory" standard liability coverage. Whether there is legal liability and the amount of damages should be fairly established and not accomplished in absentia.

It is an easy task for the Plaintiff to give the insurer a copy of the suit papers to permit an opportunity to defend. It is a devastating result to an insurer to be confronted with a judgment that it knows nothing about with a demand to pay.

The duty to cooperate clauses are virtually universal and are consistently upheld. For example, the Supreme Court has affirmed decisions finding a breach of the duty to forward suit papers in a medical malpractice case. Floyd v. St. Paul Fire and Marine Insurance Company, 285 S.C. 148, 328 S.E.2d 132 (1985). The reasons for these policy provisions requiring the insured to cooperate and forward suit papers are obvious and numerous. The party who will ultimately bear the duty to defend and to indemnify must have an opportunity to participate and protect its rights.

The policy provision requiring suit papers to be forwarded is a substantial right of the insurer and should be enforced. The decision of the Court of Appeals should be reversed and judgment entered for Pennsylvania National.

VI. IT IS NOT THE PUBLIC POLICY OF SOUTH CAROLINA TO VOID THE RIGHT OF THE INSURER TO RECEIVE SUIT PAPERS.

The Court of Appeals determined that it "need not decide whether the Trial Court was correct" in the interpretation of the statute. Instead, the Court of Appeals simply announced as a matter of public policy that the contractual right of the insurer did not apply. The Court reached this result saying: "In conclusion, we hold, as a matter of public policy, the minimum limits

automobile liability insurance policy involved in this case was not defeated or voided by Weaver's failure to comply with policy notice provisions after the accident resulting in Johnson's injuries, because the coverage was mandated by the legislature to protect innocent third parties, such as Johnson." [Appendix, p. 8.]

First, this announcement of public policy makes the very factual assumption that the parties should be entitled to litigate. Whether or not the Plaintiff is an innocent third party injured by the negligent act of someone is not established until after notice and a fair opportunity to have a trial. Also, the extent of any injuries is likewise not fairly determined until notice and an opportunity to defend.

The "innocent third party" is in no way "innocent" in the decision to seek and obtain a default judgment without giving notice and a copy of suit papers to the insurance company. Just as in Hatchett v. Nationwide Mutual Insurance Company, 244 S.C. 425, 137 S.E.2d 608, 613 (1964):

> He chose to rest his position upon the rights he had acquired through default which operated to the prejudice of the insurance company. It was in large measure deprived of the opportunity, which compliance by Plaintiff would have afforded, to investigate promptly, to negotiate a settlement without the handicap of a default position, or to sponsor the defense of the uninsured motorist, thereby insuring that the amount which Plaintiff 'shall be legally entitled to recover' be fairly established.

It does not have to be an either/or choice between the alleged injured party and the insurer. Just as in Hatchett, the injured party can preserve the benefits under the insurance policy by simply sending the suit papers to the insurer so that they are on notice rather than silently and surreptitiously obtaining a default judgment and then presenting the insurer with a fait accompli.

It is the public policy of South Carolina and the United States to afford due process of law by at least minimum standards of fundamental fairness in giving notice and an opportunity to be heard. To have a party bound by a judgment which they had no opportunity to participate in is a violation of the public policy of South Carolina.

The enforcement of contract principles of law is also consistent with the public policy of South Carolina. The upholding of the mutuality of promises of parties to a contract so that the agreed obligations are met on both sides is consistent with the public policy of South Carolina.

In addition, the enactments of the legislature which have established certain particular provisions for "certified" policies for drivers who have once violated the law establishes a distinct and different public policy from the provisions of the Reparation Reform Act which apply to the general registration of vehicles and "standard" policies.

It is not the public policy of South Carolina to encourage evasive conduct in litigation. The lack of fairness and lack of diligence in seeking out a default judgment which will be used against a known party while

deliberately not letting that party know what is happening is against the public policy of this state.

The opportunity for collusion or even simple acquiescence between an alleged injured party and a cohort who has no personal risk and may not care if their insurer gets stuck is not consistent with the public policy of South Carolina. It would be a simple matter for a named Defendant to ignore suit papers and not notify the insurer so that a comrade might reap the windfall benefits of a default judgment which then could be imposed against the insurer when it had no opportunity to sponsor the defense. In preventing this kind of collusion, the injured party can easily protect itself by sending actual notice to the insurer thereby eliminating any claim of prejudice.

The announced legislative policy behind the revision of the insurance code supports a reduction in the cost of insurance in South Carolina. The total elimination of any duty of an insured to cooperate or send suit papers runs contrary to this public policy of the state. In addition to increasing the total cost, it will result in premiums being paid by those who do give notice and cooperate to take care of those who do not give notice and do not cooperate.

The fundamental public policy of the tort liability system is basic to South Carolina jurisprudence. The fault basis of tort liability determined on the merits in an adversarial system is the touchstone of the common law of negligence in this state. When the insurer who has the contractual duty to defend and to indemnify for any legal liability can be presented with a default judgment from a proceeding in which it had no opportunity to

participate this fundamental policy of the state has been violated.

Also basic to the public policy of the State of South Carolina is the right to trial by jury. Under the decision announced by the Court of Appeals, the insurer would be precluded from a jury trial on the underlying tort action and would also have no defense to its rights under the contract.

If this case is to be decided "as a matter of public policy", the overwhelming public policy of the State requires the upholding of these agreed-to contract rights, and the recognition of the fundamental fairness of notice and an opportunity to be heard. On this basis, the decision of the Court of Appeals should be reversed and judgment entered for Pennsylvania National.

CONCLUSION

The opinion of the Court of Appeals is a novel decision which overturns decades of cases and contracts upholding the duty of a policyholder to cooperate with the insurance company and forward suit papers. The opinion effects every standard automobile policy issued in the state of South Carolina. The opinion constitutes a unique interpretation of two major legislative enactments. The opinion is inconsistent with a number of previous decisions of the South Carolina Supreme Court.

For these reasons, the Court should issue a Writ of Certiorari to review this decision, reverse and remand for entry of judgment for Pennsylvania National.

Respectfully submitted,

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